Petition

81-1669

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No.

IN THE

Supreme Court of the United States

October Term, 1981

SCHIAVO BROTHERS, INC.,

Petitioner

v.

UNITED STATES GYPSUM CO.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The well-established and long-standing limitation of appellate review contained in the Clearly Erroneous Rule is ever increasingly being eroded by the Courts of Appeals' transparent recourse to mislabelling a factual finding as "ultimate fact" or a "mixed question of law and fact" and thus subject to plenary review.

Legal commentators, the practicing bar, as well as judges of the federal courts have noted with increasing alarm that the appellate courts' expanding license to substitute their judgment for that of the trial court on factual issues has inevitably usurped the traditional role of the finder of fact; increased appeals and unnecessary remands; and further burdened already overcrowded dockets.

Accordingly, this case is of exceptional importance. It presents this Court with a clear-cut example of the undisputed and widespread abuse of the Clearly Erroneous Rule and the perfect opportunity to draw a clear and therapeutic line between appellate review and fact finding:

> Did the United States Court of Appeals for the Third Circuit subvert the intent and purpose of the Clearly Erroneous Rule when it reversed the factual finding of the trial court and held that the District Court's finding of reasonableness was a mixed question of law and fact reviewable as a conclusion of law, especially where this Court, appellate courts of the forum state, and every other circuit court addressing the issue has held that a finding of reasonableness must be reviewed as a finding of fact under the clearly erroneous standard?

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OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Third Circuit, which is not yet officially reported, is printed in the Appendix at pp. A1-A27. The opinions of the district court, officially reported at 450 F. Supp. 1291 (E. D. Pa. 1978) and 485 F. Supp. 46 (E. D. Pa. 1979), are printed in the Appendix at pp. A28-A94.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was dated and entered on November 30, 1981. (App. A95-A96). Schiavo Brothers' timely petition for rehearing in banc was denied by the Court of Appeals by Order dated December 23, 1981. (App. A97). Subsequently, an amended judgment of the Court of Appeals was dated and entered January 6, 1982. (App. A98-A99).

The jurisdiction of this Court is invoked under and pursuant to 28 U. S. C. § 1254(1).

PROCEDURAL RULE INVOLVED

Federal Rules of Civil Procedure, Rule 52(a):

> In all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous . . ..

STATEMENT OF THE CASE

In 1966, Schiavo Brothers, Inc. ("Schiavo") leased a tract of land in Southwest Philadelphia from United States Gypsum Co. ("USG"). The lease specified that the land could be used by Schiavo *only* for the less than pristine uses of a landfill and a junkyard. When the lease was terminated in 1974, USG brought suit[1] to recover from Schiavo the cost of clearing the land of debris left by the subiessee junk car dealers. (App. A29).

At trial, the factual issue presented was whether Schiavo had breached its covenant, implied under Pennsylvania law, to return the leasehold property in the same condition as received, normal wear and tear excepted. (App. A53). The evidence at trial established that the property was specifically limited to use as a junkyard (App. A36-A37); that debris was a natural and inevitable consequence of a junkyard (A33, A56, A57); that junk car dealers virtually never cleaned the property of debris upon leaving (App. A56, A57); that USG knew how junk car dealers operated when the lease was executed in 1966 (App. A32-A34, A56, A57); and that USG had made no provision in the lease requiring Schiavo to assume responsibility for clearing the debris which the junkyard dealers would inevitably produce (App. A41, A57).

After ten days of trial, extensive briefing and oral argument (App. A30), the trial court found that under the circumstances of this case, the "accumulation of debris" and the "failure to clear the debris" when the lease was terminated constituted reasonable wear and tear in the context of the junk car industry:

---

1. The basis for federal jurisdiction was diversity of citizenship between the parties, 28 U. S. C. § 1332: USG is incorporated in Delaware and its principal place of business is in Chicago, Illinois; Schiavo is incorporated in Pennsylvania and its principal place of business is in Philadelphia, Pennsylvania. (App. A30-A31, A47).

> Schiavo returned the land in substantially the same condition as existed when it received the land, reasonable wear and tear excepted. (App. A58).

The reversal by the Court of Appeals of the trial court's finding of reasonableness was based solely on its bizarre holding that a finding of reasonableness is "a mixed question of fact and law subject to review as a question of law." (App. A7). Although the panel acknowledged that review of a factual finding of reasonableness was generally subject to the "clearly erroneous" standard (App. A7 n. 2), it nevertheless inexplicably held that the question of "reasonable wear and tear" in the instant case was somehow a question of law subject to plenary review on appeal. (App. A8).

Only by expediently avoiding the clear limitation on appellate review mandated by the Clearly Erroneous Rule was the panel able to substitute its own judgment for that of the fact finder and hold that "the wear and tear inflicted [on the junkyard] was unreasonable." (App. A13).

REASON FOR GRANTING THE WRIT

The Decision Below Raises a Question of Exceptional Importance Which Must Be Settled by This Court

As set forth in Rule 52(a) of the Federal Rules of Civil Procedure, findings of fact by the district court must be affirmed by the Courts of Appeals unless "clearly erroneous."

In the instant case, the Third Circuit conveniently avoided the mandated restricted review of factual findings under the Clearly Erroneous Rule [2] by simply mischaracterizing the issue of reasonableness as a mixed question of fact and law, and thus reviewable free of the Clearly Erroneous Rule. (App. A7).

Significantly, in making its crucial finding that reasonableness is a mixed question of law and fact, the Court cited *only* two state court opinions from outside the forum.[3] (App. A7 n. 2). The Court did not cite, distinguish or discuss either opinions by the appellate courts of Pennsylvania, unanimously holding the issue of reasonableness to be a question of fact,[4] or numerous opinions by the Courts of Appeals from the Third and other Circuits, also hold-

2. *Commissioner v. Duberstein*, 363 U. S. 278, 290 (1960).

3. *Slisz v. Munzenreider Corp.*, 411 N. E. 2d 700, 710-11 (Ind. App. 1980); *Wurlitzer Co. v. Strand Enterprises*, 32 N. E. 2d 62, 63 (Ohio App. 1936).

4. *Hinkson v. Great Atlantic & Pacific Tea Co.*, 134 Pa. Super. 161, 166, 3 A.2d 197, 199 (1938) (holding on facts identical to the instant case that the issue of whether or not leasehold property was returned in the same condition as received, reasonable wear and tear excepted, "was clearly a question of fact"); *Hood v. Meininger*, 377 Pa. 342, 105 A. 2d 126 (1954) (question of reasonable time allowed to correct defect is for trier of fact); *Bogojavlensky v. Logan*, 181 Pa. Super. 312, 124 A. 2d 412 (1956) (determination of reasonableness of delay in performance of contract is for fact finder).

ing that reasonableness determinations were findings of fact subject to the Clearly Erroneous Rule.[5]

Thus, the Third Circuit's holding in the instant case that "reasonableness" is "a mixed question of fact and law subject to review as a question of law" is, in the words of the Fifth Circuit, an obvious and improper relabelling of a factual determination "in order to justify plenary review of an issue." *Van Coteghem v. Gray*, 628 F. 2d 488, 491-92 (5th Cir. 1980), *cert. dismissed*, 451 U. S. 935 (1981).

The unsupported holding of the Third Circuit in this matter is unfortunately only the latest example of the manifest abuse of the Clearly Erroneous Rule prevalent throughout the Courts of Appeals. The disregard of the Rule and its resulting injury to the entire federal judicial system has been universally lamented by legal commentators, the practicing bar, as well as district and circuit court judges. For example, in *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 612 F.2d 1353 (3d Cir. 1980), *cert. denied*, 449 U. S. 827 (1981), a member of the Third

5. *Four Sons Bakery, Inc. v. Dulman*, 542 F. 2d 829, 832 (10th Cir. 1976) ("[R]easonableness of time for revocation of acceptance is one of fact, to be made on the unique circumstances of each case"); *AMF, Inc. v. McDonald's Corp.*, 536 F. 2d 1167, 1170 (7th Cir. 1976) ("Whether in a specific case a buyer has reasonable grounds for insecurity is a question of fact"); *United States v. City of Albuquerque*, 545 F. 2d 110, 114 (10th Cir. 1976) ("We conclude that the trial court's finding that the City of Albuquerque made reasonable accommodation efforts is not clearly erroneous and should not be overturned by us"); *United States v. One Motor Yacht Named Mercury*, 527 F. 2d 1112, 1114 (1st Cir. 1975) ("[T]he determination of reasonableness of the delay is a finding of fact"); *Travelers Insurance Co. v. Davis*, 411 F. 2d 244, 248 (5th Cir. 1969) ("The reasonableness . . . of an attorney's fee is primarily a disputed question of fact"); *Clancy v. Brunswick-Balke-Collender Co.*, 291 F. 2d 799, 807 (3d Cir. 1961) (reasonable grounds for termination under employment contract issue for jury).

Circuit vividly described the tendency of the Third Circuit to act as a "rump fact-finding authority."

> Although today's decision of the court and the previous decision in *Trio Process III* involve only one case, they reflect a point of view in this court, with which I am in strong disagreement. It is a point of view reflecting a belief than an appellant court has the right to encroach upon the prerogatives of a fact finder. Today's decision, in particular, constitutes a dangerous extension of a line of cases that I believe were wrongly decided because they tampered with fact-finding orthodoxy. *See, e.g., Harganrader v. Califano*, 575 F. 2d 434 (3d Cir. 1978); *N. L. R. B. v. Armcor Industries, Inc.*, 535 F. 2d 239 (3d Cir. 1976). *Id.* at 1364 (Aldisert, J., dissenting).

Judge Aldisert's criticism of the Third Circuit is echoed by Judge Nangle of the Eastern District of Missouri in his recent article *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. UNIV. L. Q. 409 (1981), in which he lamented the almost universal tendency of the appellate courts to circumvent the Clearly Erroneous Rule.[6]

> The appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the Clearly Erroneous Rule. Although purporting to pay homage to the Clearly Erroneous Rule, appellate courts have become

6. Unfortunately, Professor Charles Alan Wright's 1957 prediction that through, *inter alia*, circumvention of the Clearly Erroneous Rule the appellate courts would usurp the judicial system has come true. *See* Wright, *The Doubtful Omniscience of the Appellate Courts*, 41 MINN. L. REV. 751, 751 (1957).

less reticent to substitute their view of the evidence for that of the trial court to "do justice." *Id.* at 410.

Erosion of the Clearly Erroneous Rule is not an academic problem. It cuts to the core of the federal judicial system. Where the simple expedient of invoking the proper talismanic words [7] "frees" the appellate courts to conduct unrestricted review of the factual findings of district courts, it inevitably "impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals." [8] In addition, appellate usurpation of district court fact finding delays justice, adversely affects judicial morale and hinders reasonable settlements.[9]

It is imperative that this Court seize this opportunity to firmly reassert the proper limits of appellate review under the Clearly Erroneous Rule. The instant case involves a clear-cut example of the ever increasing abuse of appellate review and calls for this Court's exercise of its supervisory powers to grant certiorari and reaffirm that appellate courts must strictly adhere to the Clearly Erroneous Rule, and thus rebalance the scales between the fact finder and appellate courts.

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7. Nangel, *Widening Scope of Fact Review* at 418.

8. *Pendergrass v. New York Life Ins. Co.*, 181 F. 2d 136, 138 (8th Cir. 1950).

9. Nangel, *Widening Scope of Fact Review* at 426-27. *See also* Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68, 90-91 (1977).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1168, 81-1272 and 81-1273

UNITED STATES GYPSUM COMPANY,
Appellant/Cross-Appellee

v.

SCHIAVO BROTHERS, INC.,
Appellee/Cross-Appellant

ON CROSS-APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Nos. 74-3165 and 80-0391)

Argued: September 22, 1981
Before: ALDISERT, HIGGINBOTHAM and SLOVITER,
Circuit Judges

(Opinion filed November 30, 1981)

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OPINION OF THE COURT

[Entered November 30, 1981]

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

I.

While one man's junk may be another man's profit, there comes a point where clearing junkyard remnants constitutes a substantial financial cost. Here we are required to decide whether under Pennsylvania law the landlord or the primary lessee should bear the costs of clearing the junk left by the sublessees in this case. During the last three years, two district judges have been sorting out the appropriate property and damage doctrines to determine who pays for removal of the junk and other alleged damages arising out of the tenancy. We will affirm the rulings of the district court except as to its decision not to consider the issues of holdover rent and loss-of-use of purchase monies, and we will remand for further proceedings on those two claims.

II.

The facts of this case have been set forth twice, at length, in two different district court opinions, reported at 450 F.Supp. 1291 (E.D.Pa. 1978) and 485 F.Supp. 46 (E.D.Pa. 1979). We therefore only summarize them here.

The plaintiff, United States Gypsum Company (Gypsum) owned a landfill in southwest Philadelphia. In 1966, it entered into a lease agreement with the defendant Schiavo Brothers, Inc. (Schiavo). Gypsum and Schiavo also agreed by separate contract that Schiavo, a waste hauling firm, would haul waste for Gypsum. Schiavo sublet part of the property to automobile junkyard operators. Schiavo's lease with Gypsum was lawfully terminated by Schiavo, effective January 1, 1974, but most of the junkyard dealers (the sublessees) refused to leave until well into the summer of 1974. Meanwhile Gypsum had agreed to sell the property to Swann Oil Company, but the sale was delayed, allegedly because Swann would not accept transfer of the property until all of the debris left by the junkdealers had been cleared. That debris covered most of the property and included car seats, tires and other by-products of junkyard dealing. When the junkdealers finally left, Gypsum was obliged to hire a contractor to clear the debris. After the debris was cleared, Gypsum transferred the property to Swann in September, 1974, almost four months later than both parties had planned.

Gypsum sued Schiavo for the cost of the cleanup, for holdover rent[1] and for damages compensating it for

1. A holdover tenant is one who fails to abide by the term of a lease requiring the tenant to vacate on an agreed date. Katzman v. Hoffman, 242 F.2d 354, 358 (3d Cir. 1957). We use the term "holdover rent" to apply to all of the damages, rent and others, sought by Gypsum for Schiavo's occupancy of the premises beyond the termination of the lease. *See* Restatement (Second) of Prop-

the loss of the use of the money due from Swann that was not received until after the clean-up. Jurisdiction was founded on diversity of citizenship, and the law of Pennsylvania governs the action

The case was assigned to the calendar of Judge Herbert A. Fogel, who ordered that liability and damages be tried separately. Trial on liability issues began in November, 1975 and continued, intermittently, into January, 1976. Judge Fogel filed his judgment shortly before he resigned in May, 1978.

Judge Fogel ruled that under Pennsylvania law there was, implied in the lease between the parties, a covenant by Schiavo to return the leasehold property in the condition in which it received it, reasonable wear and tear excepted. He ruled that that covenant is a part of a tenant's obligations under a lease unless it is negated by contrary language in the lease, and that no such contrary intent was expressed in the lease at issue. He also found, however, that Schiavo had not breached the contract, and that in the context of the junkyard industry, the leaving of the debris was reasonable wear and tear to the property. He entered judgment in favor of Schiavo without mentioning the issues of holdover rent and loss of use of purchase monies.

Judge Louis H. Pollak was assigned the case after post-trial motions had been filed by both sides. He agreed with Judge Fogel that the implied covenant existed, but he reversed Judge Fogel's conclusion that Schiavo had not breached the covenant. He ruled that the debris exceeded reasonable wear and tear, and he therefore ordered a trial on damages relating to breach of the covenant. He also ruled, initially, that Judge Fogel should have entered find-

NOTE — *(Continued)*

erty, Landlord and Tenant, §§ 14.5, 14.6, (1976) for a discussion of the various types of damages recoverable from a holdover tenant.

ings on holdover rent and loss of use of purchase monies. However, upon a motion for reconsideration filed by Schiavo, Judge Pollak decided that Gypsum had not placed its claims "in so clear a focus as to warrant my concluding that (1) the claims were actually litigated, and (2) Judge Fogel erred in not ruling on them." 485 F.Supp. at 56. He therefore denied Gypsum any relief on the claims of holdover rent and loss of use of purchase monies.

After trial of damages Judge Pollak awarded Gypsum $96,815.00 to compensate it for its expenditures in clearing the debris caused by Schiavo's subtenants. He denied Gypsum's request for an award of prejudgment interest. He also dismissed, on the basis of *res judicata*, a second complaint brought by Gypsum seeking to recover holdover rent and loss of use of purchase monies.

Both parties appealed. Schiavo challenges the rulings of Judge Fogel and Judge Pollak that any implied covenant existed. Gypsum challenges Judge Pollak's rulings precluding recovery for holdover rent and loss of use of purchase monies, his dismissal of the second action, his refusal to award prejudgment interest, and his refusal to disburse to Gypsum certain escrow funds held by Schiavo.

III.

Existence of the Implied Covenant

Schiavo vigorously disputes the rulings of both Judge Fogel and Judge Pollak that there existed an implied covenant in the agreement between the parties that Schiavo would return the property in the condition in which it received it, reasonable wear and tear excepted.

Schiavo implicitly concedes that under Pennsylvania law, the covenant exists unless it is, in some manner,

negated. However it argues that the integration clause in the lease *did* negate any implied covenants. The integration clause said in part:

> It is expressly understood and agreed by and between the parties hereto that this lease and the riders attached hereto and forming a part hereof set forth all the promises, agreements, conditions and understandings between the Lessor and or its Agent and Lessee relative to the demised premises, and that there are no promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

Although there is some force to Schiavo's contention, we have concluded that the courts of Pennsylvania would hold that the covenant was not negated by the integration clause at issue. The obligation of a tenant to return the leasehold property in the condition in which it was received, reasonable wear and tear excepted, is fundamental to the landlord-tenant relationship, even in a commercial setting. A landlord is entitled to presume that the tenant has implicitly promised not to waste the property. For that reason, only the clearest negation of the obligation will overcome the landlord's lawful expectation. We agree with Judge Fogel's discussion of the issue (450 F.Supp. at 1304), and affirm the district court's ruling on the point.

IV.

Breach of the Implied Covenant

Schiavo also appeals Judge Pollak's determination that it is liable for $96,815.00, Gypsum's costs in clearing the debris that was left by Schiavo's subtenants.

Judge Fogel placed great weight on the trial evidence showing that "upon termination of a junkyard lease, the

dealer rarely, if ever, cleared the property of accumulated debris. . . ." 450 F.Supp. at 1306. He ruled that the implied covenant to return the property in the condition in which Schiavo received it, reasonable wear and tear excepted, had not been breached:

> We find . . . that USG has failed to meet its burden of establishing that, in the context of the junk car industry, the wear and tear to the land was excessive or unreasonable.

450 F.Supp. at 1305.

Part of Gypsum's timely motion for a new trial sought reconsideration of Judge Fogel's finding that the wear and tear inflicted on the property was reasonable. In a thoughtful opinion Judge Pollak ruled that he was empowered to reconsider Judge Fogel's conclusion on reasonableness; that, in his opinion, the Pennsylvania courts would not give controlling effect to industry custom; and that the wear and tear inflicted by Schiavo was not reasonable.

The parties disagree on whether the "reasonableness" determination is a finding of fact or a conclusion of law. Generally, where the primary facts are undisputed and only ultimate inferences and legal consequences are in contention, a question of law is presented; or, by some formulations, a mixed question of fact and law subject to review as a question of law. *Ross v. Commissioner of Internal Revenue*, 129 F.2d 310, 312 (5th Cir. 1942). *See also* 9 Wright and Miller, Federal Practice and Procedure (2d Ed.), § 2589, at 753; *Fleer Corporation v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 154 (3d Cir. 1981); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 267 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).[2]

2. Other courts have held that, where the basic facts are not in dispute, ultimate questions of "reasonableness" are mixed ques-

In this case, only the legal consequences of Schiavo's conduct, and not the particulars of the conduct itself, were in issue before Judge Pollak. He was asked to decide whether the law of landlord and tenant in Pennsylvania would hold Schiavo liable for damages because of the undisputed condition of the property after the termination of the lease. That determination is essentially a legal one.

We conclude that where a successor judge is asked by timely and proper motion to reconsider the legal conclusions of an unavailable predecessor, he or she is empowered to reconsider those issues to the same extent that his or her predecessor could have. Our conclusion rests on three grounds. First, we are bound by clear precedent of this court:

> The petitioners base their claim for relief . . . upon the rule that judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other . . . [citations omitted]
>
> . . . .
>
> [T]here may be exceptional circumstances under which the rule is not to be applied. Such circumstances exist when the judge who made the original decision is not available to consider the application

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NOTE — *(Continued)*

tions of fact and law, subject to plenary review on appeal. See, *e.g.*, Slisz v. Munzenreider Corp., 411 N.E.2d 700, 710-11 (Ind.App. 1980); Wurlitzer Co. v. Strand Enterprises, 32 N.E.2d 62, 63 (Ohio App. 1936). The standard of review is of course different where the issue is how a reasonable *person* would have acted in a like situation — a determination that is peculiarly one for the factfinder. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 n. 12. *Compare* 9 Wright and Miller, *supra*, § 2589 (mixed questions of fact and law generally subject to plenary review), and *Id.*, § 2590 (negligence finding subject to "clearly erroneous" review.)

> to rehear and reverse his decision. If the judge who made the decision dies or resigns from the court he obviously is no longer available to consider it and such consideration must perforce be by another judge if it is to be had at all.

TCF Film Corporation v. Gourley, 240 F.2d 711, 713-14 (3d Cir. 1957) (affirming successor judge's reversal of a denial of leave to amend complaint). We have held the rule to apply where a "mixed question of fact and law" is presented; that is, where the primary facts are not in dispute but ultimate inferences and legal conclusions are. *Ryans v. Blevins*, 258 F.2d 945, 946 (3d Cir. 1958) (successor judge's reversal of his predecessor's application of the "last clear chance" doctrine to undisputed facts).

Second, were we to hold that Gypsum was not entitled to have its request considered by Judge Pollak, we would effectively be denying it its right to move for reconsideration—a right recognized by the Federal Rules,[3] and the Local Rules of Civil Procedure of the Eastern District of Pennsylvania, where this case was tried.[4] A litigant's right to try to persuade a court that it has erred should not be denied simply because of the unavoidable unavailability of the judge who rendered the original decision.

Third, we agree with the succinct reasoning of the Seventh Circuit in a similar case:

> Regardless of the impact of any law-of-the-case rule, our duty is to determine whether the judgment of Judge Miner [a successor judge] is correct. In fact

3. See Rules 52(b), 59 and 60. *Cf.* Rules 15(b), 16.

4. Local Rule 20(g), E.D.Pa. Two of the other district courts in this circuit — the Districts of New Jersey and Delaware — likewise provide for reconsideration by Local Rule: Local Rule 12(I), D.N.J.; Local Rule 3.3, D.Del.

> we should sustain any judgment from which an appeal has been taken if it is supported by the record and the law . . . . Obviously we cannot be expected to reverse a correct decision by one district judge simply because we find that it is contrary to a prior ruling by another district judge in the same case . . .

Parmelee Transportation Co. v. Keeshin, 292 F.2d 794, 797 (7th Cir. 1961). It remains for us to decide, however, whether we agree with the legal determination of Judge Pollak, who ruled as follows:

> [T]he fact that . . . junkdealers are "in general, an extremely difficult group with whom to deal . . . and that upon termination of a junkyard lease, the dealer[s] rarely, if ever, cleared the property of accumulated debris", should not, without more, immunize them (or those responsible for them) from liability. Such behavior was not "reasonably necessary in order for the [junk car dealers] to use the leased property in a manner that [was] reasonable under all the circumstances." Restatement 2d of Property, Landlord-Tenant, Section 12.2.

485 F.Supp. at 52.[5]

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5. Section 12.2(1) says:

> Permissible changes by the tenant — Except to the extent the parties to a lease validly agree otherwise, the tenant is entitled to make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances.

We agree with Judge Pollak that, because of the absence of clear Pennsylvania precedent on many of the points at issue, our analysis in this diversity case is, by necessity, largely predictive. Most of our citations to the Restatement are meant to encompass our prediction that the courts of Pennsylvania would adopt the cited principles.

Although Judge Pollak's interpretation of the obligations imposed on a tenant by § 12.2 is phrased somewhat differently from Judge Fogel's discussion of the "reasonableness" of the wear and tear, *supra,* in fact each used virtually the same standard. Comment d to § 12.2 provides in relevant part:

> No matter what use of the leased property is determined to be reasonable under all the circumstances, normal wear and tear on the leased property by that use is not only reasonably necessary, but reasonably to be expected by the parties, absent an agreement otherwise. . . .

Because "normal wear and tear" is *per se* a part of that which is "reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances," the fundamental question decided by both Judge Fogel and Judge Pollak was whether the wear and tear imposed on the property was "reasonable." Restatement (Second) of Property, Landlord-Tenant, § 12.2(3).

When determining what constitutes "wear and tear" for a junkyard or landfill we write on a clean slate, since we have not found, and no one has called to our attention, any prior cases defining "wear and tear" in such a context. Even the references to wear and tear in the Comments to the Restatement include such traditional examples as the wearing down of refinished floors and the leaving of holes caused by picture hooks — instances in which wear and tear seems to imply some gradual wearing. In this case instead of wear and tear we have a "dump and add" phenomenon. Nevertheless, the central issue is the same as that in more traditional wear and tear cases, *i.e.,* whether the condition of the property,

viewed in light of its potential for sale or re-rental, has deteriorated so unreasonably that the tenants, rather than the landlord, should be required to pay for its restoration. We therefore have little difficulty in concluding that "wear and tear" is at issue.

In this case a landlord leased a largely vacant piece of land in January of 1966. 450 F.Supp. at 1298. A relatively small part of that property was sublet to junkdealers. The land was returned about one hundred and three months later, sometime in the summer of 1974, with debris "spread generally throughout the leasehold area."[6] *Id.* at 1301. Gypsum received ninety-six months' rent for its property, a total of about $191,500. Yet Gypsum was required to pay $96,815.00 — more than half of the rent it received during the eight years — to clean the debris caused by Schiavo's subtenants.[7] Moreover, Gypsum was saddled with the dual aggravations of arranging for the clearing of the property and having to wait for that process to be completed. We agree entirely with Judge Pollak that the Pennsylvania courts would not require a land-

6. The area that was *not* free of debris in 1966 was returned in 1974 in as good or better condition than that in which it was rented.

7. Schiavo contended at trial that Gypsum realized $17,000 per year in synergistic savings by entering into the combined leasehold/waste-hauling agreement with Schiavo. Our review of the record indicates that Gypsum, for its own reasons, had insisted on an arm's length hauling rate separate from the lease. (App. at 1125). Nevertheless, even if Judge Fogel had found as a fact that Gypsum indeed saved money from the combined leasehold/hauling agreement, it is clear that it would have saved but $34,000 in the first two years and at most $34,000 between 1968 and 1972 after its waste hauling needs had declined by sixty per cent (the landfill operation closed in 1972). Even if those savings had been viewed as additional rent, the total rent would have been about $259,000. The cost of clearing the debris caused by the subtenants remains $96,815, or almost forty per cent of the total "rent" — hardly reasonable to ask a landlord to accept.

lord to pay for the kind of behavior engaged in by the junkdealers in this case. The leaving of massive amounts of debris on otherwise vacant property to the significant detriment of the landlord is, in our crowded age, unreasonable wear and tear, regardless of whether the industry involved makes a habit of it. As between Gypsum and Schiavo it is Schiavo who must bear the cost of the clean-up because it was Schiavo who chose to rent to the largely judgment-proof junkdealers. Certainly, Gypsum foresaw that Schiavo would lease to junkdealers, but that foresight hardly solves the problem of which party to the agreement ought to pay for the conduct that occurred. We conclude that under the law of Pennsylvania, the wear and tear inflicted was unreasonable, and Schiavo should compensate Gypsum for it.

V.

Gypsum's Requests for Rulings on Claims

It is often difficult for a trial judge hearing a case to determine whether counsel has presented a claim with sufficient specificity to put opposing counsel on notice to defend it, or whether in the course of pretrial and trial proceedings counsel has waived the claim. The problem of ascertaining whether there was or was not a waiver of a claim is even more difficult when a judge must decide on a cold record what was waived or litigated before his or her predecessor. Yet, this is the troublesome problem that Judge Pollak was required to adjudicate — *i.e.* whether "the Court [Judge Fogel] failed to rule on two of its [the plaintiff's] damage claims," 485 F.Supp. at 51, or whether "the failure to enter findings with respect [to these claims] is tantamount to findings adverse to [the claimant]' " *Id., quoting Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39, 46 (7th Cir. 1961).

Judge Pollak originally concluded that "the failure to enter findings on these two claims was oversight, and one which Judge Fogel would have been required to correct had he still been on the bench when plaintiff's motion was filed. As his successor, I am equally obliged to reopen the judgment . . ." 485 F.Supp. at 51-2. However, upon a motion for reconsideration filed by Schiavo Judge Pollak reversed his ruling:

> I have concluded that the presentation of these two damage claims [holdover rent and loss of use of purchase monies] at the trial before Judge Fogel did not place them in so clear a focus as to warrant my concluding that (1) the claims were actually litigated, and (2) Judge Fogel erred in not ruling on them. It was, therefore, inappropriate for me to re-open the record as to these claims. I will vacate that portion of my May 22 order.

Id. at 56.

After Judge Fogel's findings were filed, Gypsum presented a motion and memorandum of law captioned "Motion for a New Trial" (essentially, a Rule 59 motion) as a part of which it sought additional findings of fact and conclusions of law under Rule 52, Fed. R. Civ. P.[8] Rule 52(a) provides in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law

8. We agree with Professor Moore that "Since the time periods for the various motions [Rule 52(b) and Rule 59(a) and (e)] are identical and the motions are closely related, a movant should not be prejudiced by an erroneous rule reference, but should be granted whatever relief his motion shows him to be entitled." 6A Moore's Federal Practice ¶ 59.04[6] (2d Ed.).

> thereon, and judgment shall be entered pursuant to Rule 58; . . . . Requests for findings are not necessary for purposes of review. . . .

Rule 52(b) provides in part:

> Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59 . . .

The claims on which Gypsum sought rulings in its post-trial motion were those relating to Schiavo's liability for holdover rent and loss of use of purchase monies.

A.

Holdover Rent

Two years after the conclusion of a complex trial, Judge Fogel rendered findings of fact and conclusions of law which omitted any discussion of the issue of holdover rent that Gypsum believed it had litigated. The Rules recognize that judges will occasionally overlook issues, especially in a complex case. In a *jury* case Rule 51 affords counsel the opportunity during trial to call the court's attention to claims upon which counsel believe the jury should be charged, even after the court has given all of the instructions that it had intended to give. In a non-jury case, of course, counsel will not always know which issues the court has been considering until it has rendered its findings of fact and conclusions of law, and, normally, a judgment. Rule 52(b) was designed to deal with exactly the sort of problem raised by Gypsum in its post-trial motion. It permits counsel to ask the court to correct,

on the non-jury record before it, any errors of law, mistakes of fact or oversights that require correction.[9]

Rule 59(a) complements Rule 52. When the trial record before the court in a non-jury case is infected with "manifest errors of law or fact," 6A Moore's Federal Practice ¶ 59.07 (2d Ed.) (and cases cited), the court may order a new trial on some or all of the issues in the case. A new trial is sometimes the only effective way to cure the prejudice resulting from errors or oversight, and if that is the case a new trial must be ordered. Very often, however, corrections can be made without reopening the trial record.

Where a new trial is not ordered, the trial record must support whatever additional findings of fact or conclusions of law a party seeks under Rule 52(b) or it is certainly not entitled to them. That entitlement also depends, as Judge Pollak recognized, on what the trial court required the moving party to prove. *See* Rule 16, Fed. R. Civ. P.

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9. Although Rule 52(b) does not explicitly refer to reconsideration of conclusions of law, it is clear that the district court has the power under Rule 52(b) and 59(e), read together, to alter or add to its conclusions of law where appropriate. See 5A Moore's Federal Practice ¶ 52.11[2] (2d. Ed.). *Cf.* Parmelee Transportation Co. v. Keeshin, *supra*, 292 F.2d at 797. Factual determinations are correctable under Rule 52(b) if the district judge who heard the evidence believes that they are necessary, and capable of being made without the grant of a new trial. We hold in this case that a successor judge is generally empowered to decide a reconsideration motion in the same way his or her predecessor could have. However, like the court in Ryans v. Blevins, *supra*, 258 F.2d at 945, we do not address whether a successor judge is, under any circumstances, empowered by Rule 52 to add to or alter the *factual* determinations of the predecessor judge who heard the trial evidence. That situation very likely presents an exception to our holding that the successor judge steps completely into his or her predecessor's shoes in deciding a Rule 52 motion.

This case therefore compels us to examine, in some detail, exactly the situation Gypsum faced at the beginning of trial. Judge Fogel bifurcated the trial into liability and damages phases.[10] Indeed, that was Judge Fogel's practice in virtually every civil case on his calendar, as reflected in his standing pretrial order. (App. at 32). Gypsum alleged in its complaint that "As a result of defendant's breach of its covenants to surrender complete possession of the premises to the plaintiff on the date of termination, January 1, 1974, plaintiff has suffered damages in the amount of the rental value of the property from the date of termination to the date Swann was ready, willing and able to proceed to settlement under the agreement of sale of the leasehold property, but for the presence of the debris." (Complaint ¶ 23).[11] Gypsum in-

10. Bifurcation of liability and damages is permitted by Rule 42(b), Fed. R. Civ. P.

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a trial of any . . . separate issue . . ."

11. The phrase "but for the presence of the debris" refers only to Swann's unwillingness to purchase the property before it was cleared of debris. That stipulation was part of Swann's contract of sale with Gypsum. The date Swann was "ready, willing and able to proceed to settlement . . . but for the presence of the debris" was approximately June 1, 1974, more than three months before the debris was cleared. We do not construe the phrase "but for the presence of the debris" in this paragraph to be intended to amplify the allegation that Schiavo failed to "surrender complete possession of the property," (although it is possible that the debris itself was sufficient to deprive Gypsum of possession of certain parts of the property at the time.) Rather, the paragraph as a whole refers to the period of time between January and June in which (1) some of Schiavo's subtenants were still in possession of parts of the property and holdover rent was the only remedy at issue, and (2) at the end of which (approximately June 1) loss of use of purchase monies first became a conceivable element of damages (*i.e.*, Swann

cluded, in its pretrial Proposed Findings of Facts, a finding that "Schiavo notwithstanding that it terminated the lease with Gypsum, did not vacate the leasehold property as of January 1, 1974." Gypsum listed as "Contested Issues" in the joint pretrial order "Whether Schiavo is liable to United States Gypsum for damages. . . . (b) for rent from February 1, 1974 to September 26, 1974, at $1,667.67 per month [and] (c) For the loss of the use of $1,282,895 from June 1, 1974 to September 26, 1974."

Gypsum *proved* that the lease existed, that Schiavo terminated it, and that the termination was effective as of January 1, 1974, or at the latest, February 1, 1974. 450 F.Supp. at 1299; Exh. P. 58. Gypsum also proved that "only one of the dealers vacated his lot [as of December 31, 1973]", 450 F.Supp. at 1300; that the "other dealers formed an association to fight eviction," *Id.;* and that "[d]uring the course of the summer of 1974, the junk car dealers gradually vacated the premises," *Id.*

Unfortunately, one lawyer's liability issue is another lawyer's damages issue. For example, a claim for five months of holdover rent can be viewed in at least two ways. There can be liability for some holdover rent, with the length of the holdover being a damages issue; or there can be liability for five different months of holdover tenancy, with a later damages determination involving, in a simple case, only a multiplication of a monthly number by five.

In discussing bifurcation of liability and damages under Rule 42(b) in a slightly different context (an antitrust case in which proof of injury was an element of liability) the Fifth Circuit observed:

NOTE — *(Continued)*

was ready to settle but for the presence of the debris). In short, ¶ 23 is a "holdover tenants" paragraph and not a "holdover debris" paragraph. See 485 F.Supp. at 56.

> The use of this trial procedure [bifurcation of liability and damages] must be grounded upon a clear understanding between the court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next.

Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1324 (5th Cir. 1976).

In this case, Judge Fogel made it clear at the final pretrial conference that liability and damages issues would be strictly separate:

> MR. ELLIOTT [counsel for Schiavo]: This is a bifurcated trial. I think damages are inappropriate. I haven't put any facts in as to the damages because of the standing pretrial order which says—
>
> THE COURT: I think that's right. That is correct because I said I want to bifurcate as to liability first.
>
> MR. BAYLSON [counsel for Gypsum]: Does that mean I don't have to be prepared for damages?
>
> THE COURT: No, because what I will do is when the testimony is completed, obviously, I think in a case of this importance to both sides you would probably want the transcript with a right to submit any supplemental data you may want as to what develops.
>
> MR. BAYLSON: Okay.
>
> THE COURT: Therefore, you don't have to go to the expense or trouble of putting on any damage witnesses.
>
> MR. BAYLSON: Fine.

Unfortunately, Judge Fogel did *not* clarify with counsel where the dividing line between liability and damages was to be.

The touchstone, in reviewing bifurcated proceedings, is whether the party bearing the burden of proof was unfairly prejudiced by the procedures employed. Rule 42(b) permits bifurcation to "avoid prejudice," not to create it.

Judge Fogel's standing pretrial order, the joint pretrial order and the transcript of the pretrial conference do not reflect the clear separation of issues into liability and damages, nor the "clear understanding [of] . . . what proof will be required to pass from one phase to the next" (*Response of Carolina, Inc.*, 537 F.2d at 1324), that would have been necessary before Gypsum could be charged with having waived certain points by not having litigated them aggressively enough in the liability phase.[12]

Counsel for Gypsum could reasonably have concluded that his obligations during the liability phase were to plead the holdover tenancy,[13] to offer to prove a failure to surrender possession, and to prove that Schiavo failed to surrender possession of *some* part of the premises for *some* period of time after the termination of the lease. Gypsum, in fact, met each of those requirements. Calculations of the time of the holdover and the acreage unlawfully possessed are reasonably susceptible of being called questions of damages.

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12. Generally, pretrial orders under Rule 16 are to be liberally construed to embrace all legal and factual theories inherent in the issues defined therein. Century Refining Co. v. Hall, 316 F.2d 15, 19-20 (10th Cir. 1963); Peter Pan Seafoods, Inc. v. United States, 272 F.Supp. 888, 891 (W.D.Wash. 1967) *rev'd on other grounds*, 417 F.2d 670 (9th Cir. 1969). Gypsum was simply not accorded that latitude in this case.

13. Of course, the plaintiff need only plead his claim. The magic legal words "holdover tenancy" were certainly not necessary where the plaintiff so clearly put Schiavo's failure to surrender possession in issue. See Rule 8(f), Fed. R. Civ. P.

Certainly, Judge Fogel could have required more extensive proof of "liability" for holdover tenancy, for example, proof of the number of months the sub-tenants were in possession. Nevertheless, he did not, and it would be unfair to penalize Gypsum for not having done what it was never required to do.

A holdover tenant is one who unjustifiably refuses to surrender possession of a leasehold premises at the end of the term of the lease. *See* n. 1, *supra.;* Restatement (Second) of Property, Landlord and Tenant, § 14.1. The landlord may sue such a holdover for possession and to recover whatever damages it suffered as a result of the tenant's actions. *Taylor v. Kaufhold,* 368 Pa. 538, 544, 84 A.2d 347, 350 (1951). Schiavo chose, as a tenant, to sublet the property to subtenants, and their presence after January 1, 1974 is imputable to Schiavo. *Id.* Certainly it *appears* that Schiavo wrongfully denied Gypsum possession of some part of the leasehold property for some period of time after the termination of the lease.

We conclude, therefore, that Judge Pollak could have entered a conclusion of law on Schiavo's liability *vel non* for holdover rent; that is, there is a sufficient record upon which to base such a determination. It would be inappropriate, however, for us to make that determination, because we have not been briefed as to what legal defenses Schiavo may have had, given Judge Fogel's findings of fact and other facts not in dispute.[14] Moreover, Rule 52(a) reposes in the district court the responsibility for entering *initial* rulings on each issue raised at trial. We will therefore remand the case to the district court for an examination of record of the trial before Judge Fogel, a conclusion of law as to liability for holdover rent, and, if necessary, further proceedings on damages for the holdover.

14. Judge Pollak, in fact, alluded to some possible defenses in his original opinion. 485 F.Supp. at 51.

B.

Loss of Use of Purchase Monies

Much of our discussion of the holdover rent issue applies to Gypsum's claim for loss of use of purchase monies. Judge Fogel did not reach the issue, and Judge Pollak ruled that Gypsum had waived it. Judge Fogel had found that

> ". . . USG had arranged for the sale of the leasehold property to Swann Oil Company (Swann), as part of the agreement of sale, dated January 18, 1974; closing was made conditional upon all debris being removed from the land. It was thus vital to USG's interests that the property be cleaned.
>
> . . . .
>
> During the period when the dealers were vacating the premises, Schiavo denied that it was its responsibility to remove the debris left by the dealers, or the debris accumulated through fugitive dumping. As a result, in order to guarantee that the sale of the property to Swann would go through, USG was forced to hire a private contractor, George Hunter, to clear the debris. Hunter performed this work at a total cost of $144,500; the closing on the sale of the proptery to Swann was held on September 30, 1974.

450 F.Supp. at 1300.

Gypsum introduced evidence that the agreed purchase price was $1,282,895, and that representatives of Swann refused to proceed to settlement until the debris had been cleared, as was its right under the contract of sale. (App. at 849).

Moreover, Gypsum had raised the issue in its complaint, in its pretrial Proposed Findings of Fact and in its pretrial "Statement of Contested Issues":

[Complaint, ¶] 24. By failing to remove the debris as of the date of termination of the Lease, defendant has breached its duty to surrender the premises in substantially the same condition that it was in at the time defendant took possession, reasonable wear and tear excepted. As a result of such breach, plaintiff has sustained damages in the amount of:

. . . .

(b) the loss of the use of the purchase monies under the agreement of sale with Swann from June 1, 1974, the date on which Swann was ready to settle but for the presence of the debris and scrap, to September 26, 1974, when plaintiff conveyed the leasehold property to Swann and received the purchase monies.

. . . .

[Proposed Finding of Fact] 58. As of June 1, 1974 Swann Oil Co. was ready, willing and able to proceed to closing on the Agreement of Sale dated January 18, 1974, but for the debris on the leasehold property which had not been removed.

. . . .

61. USG, in order to complete the sale . . . to Swann Oil, was forced to undertake . . . the clearing of the leasehold property. . . . The sale of the leasehold property took place on September 26, 1974.

. . . .

[Contested Issue] 5. Whether Schiavo is liable to United States Gypsum for damages.

. . . .

(c) For the loss of the use of $1,282,895 from June 1, 1974 to September 26, 1974."

Gypsum therefore did not in any sense waive the issue during the liability phase.

In any event, we think the issue should be treated in the way it was raised by Gypsum — as a damage issue. Loss-of-use is very arguably an element of the damages proximately caused by Schiavo's breach of the implied covenant, that is, its failure to clear the debris. Gypsum's complaint (¶ 24(b), *supra.*) alleged exactly that.[15] Counsel for Gypsum could justifiably have assumed that the Swann Oil sale was purely a question of damages for breach of the implied covenant as to which he had *no* obligation to present evidence during the liability trial. It is perfectly clear that that was counsel's understanding, since, in the pretrial order, he had offered testimony as to the "cost of delay [in clearing the debris] to United States Gypsum in loss of use of funds from June 1, 1974 to September 26, 1974" under the caption "Plaintiff's Witnesses-Damages." In fact, Judge Fogel at one point indicated that the issue was one of damages while a witness from Swann Oil was testifying. (App. at 848-9).

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15. Gypsum also cites § 14.6 of the Restatement (Second) of Property, *supra*, which reads as follows:

> *Liability of Holdover Tenant for Special Damages* — Except to the extent the parties to a lease validly agree otherwise, if no election is made under the rule of § 14.4, the landlord, or incoming tenant, is entitled to recover from a tenant improperly holding over after the termination of his lease for the special damages caused by the holdover which the tenant could reasonably have foreseen at the time of his holding over would result from his conduct, and which the injured party could not reasonably have avoided, unless equitable considerations justify relieving the tenant of some or all of these damages.

Loss-of-use may be an element of damages not only for breach of the covenant but for the holdover tenancy (*i.e.*, if Swann would have refused to settle for part of the summer because of the subtenants), a question which the district court may wish to consider on remand if liability for the holdover is established.

Equally important is that Judge Fogel might well have entered a finding on loss-of-use if it had been germane to his holding on the lease-related issues. As it was, his finding that the implied covenant was not breached eliminated any reason for him to consider whether there was "liability" for various damages resulting from the breach. After Judge Pollak reversed Judge Fogel's liability finding, he was obliged to consider Gypsum's timely raised claim for loss-of-use damages. We will therefore remand the loss-of-use issue to be considered in the first instance by the district court.[16]

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16. As our discussion indicates one of our disagreements with Judge Pollak is our view that the claims for holdover rent and loss-of-use are distinct, and in fact flow from two different alleged acts of the defendant — the failure to surrender possession and the breach of the implied covenant, respectively. (But see n. (15) *supra*.) Judge Pollak viewed them as unitary. 485 F.Supp. at 51. Nevertheless, our discussion of the *nature* of the claims is not intended to be a commentary on their merits. For example, significant issues remain with respect to the loss-of-use claim. Even if the presence of the debris was the cause of Swann's refusal to settle — an issue which the district court will decide on remand — there remains the question of whether Schiavo should be required to pay for the harm resulting to Gypsum. Normally, "where the breach [of contract] by the defendant has prevented the use and operation of property by the plaintiff from which use profits would probably have been made, the damages to be recovered may be measured by [rental value] . . . or by interest on the reasonable value of the property as an investment." 5 Corbin on Contracts § 1029, at 177 (footnotes omitted). Interestingly, however, the Restatement (Second) of Property, § 12.2(2) — the subsection dealing with remedies for breach of the implied covenant at issue — omits any mention of the recoverability of "special" damages for breach of the covenant. See, especially, Comment i. Compare *Id.* § 14.6 (special damages recoverable for holdover tenancy). The district court must decide on remand whether the courts of Pennsylvania would permit recovery of loss-of-use damages on whatever facts it finds.

VI.

Other Issues

Judge Pollak dismissed a second complaint which was filed by Gypsum after he had refused to consider holdover rent and loss-of-use in the main action. The new complaint simply renewed those two claims. Judge Pollak ruled, in accordance with his earlier ruling, that the issues were *res judicata* and could not be raised in a second complaint, because they "should have been fully litigated" in the first action, *citing, Bearoff v. Bearoff Bros., Inc.*, 458 Pa. 494, 498, 327 A.2d 72, 74 (1974). One of the requirements for concluding that a matter is *res judicata* is, of course, that there be an extant final judgment from an earlier action on the matters at issue, which is unreversed on appeal. *Bearoff*, 458 Pa. at 498, 327 A.2d at 74-75. With our decision, that is no longer the case as to the first action. We will therefore vacate Judge Pollak's ruling and remand the second case to the district court so that it can decide whether to consider it or dismiss it anew on a basis other than *res judicata*.

We have considered Gypsum's arguments anent the district court's denial of prejudgment interest and its refusal to order the disbursement to Gypsum of certain escrow funds and find them to be without merit.

VII.

Conclusion

We will affirm the district court's judgment in part and reverse it in part, and we will remand both cases for further proceedings, consistent with this opinion, on the plaintiff's claims for holdover rent and loss of use of purchase monies.[17]

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17. This case has now occasioned hundreds of pages of briefing and at least six different fairly lengthy written opinions in two different courts. Something about this saga of landlord and tenant seems to have caused the tiny segment of the legal community that has dealt with it — both lawyers and judges — to discuss it at extraordinary length. It is time, however, to bring this litigation to a close, and we urge the parties that in view of this opinion they first explore a prompt negotiated resolution of their remaining differences before this protracted litigation is continued.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 74-3165

UNITED STATES GYPSUM CO.

v.

SCHIAVO BROTHERS, INC.

OPINION AND ORDER

[Entered May 18, 1978]

FOGEL, *J.*

I. INTRODUCTORY STATEMENT:

> Good name in man and woman, dear my Lord,
> Is the immediate jewel of their souls;
> *Who steals my purse steals trash; 'tis something, nothing:*
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.[1]
> (Emphasis supplied.)

The subject of this lawsuit concerns no one's good name; it does concern trash. While the actors in this saga

1. Othello, William Shakespeare (1964) — speech of Iago Act III, Scene III — Lines 155-161 — Edition of 1936, edited by George Lyman Kittredge.

do not quite reach the dramatic heights of an Othello or an Iago, the bitterness generated by this dispute between landlord and tenant with respect to the responsibility for cleaning up industrial land has produced quite a scenario (and has also provided us with more than one sideshow). It is the consequence of a long standing business relationship gone sour.

Plaintiff, United States Gypsum Company (USG), was the lessor of a tract of land in Southwest Philadelphia under a lease agreement which began in 1966 and ended in 1974. USG seeks to recover from the lessee under that lease, Schiavo Brothers, Inc. (Schiavo), costs incurred by USG in clearing a large amount of trash and debris left on the land by Schiavo at the termination of the lease. The cause of this accumulation of debris was the use to which the property was put; Schiavo, pursuant to the terms of the lease, sublet a substantial portion of the leasehold premises to junk car dealers. When these dealers vacated the property in 1974, they neglected to take with them a substantial amount of the remains of their operations, specifically tires and car seats. Additionally, the property accumulated, during the course of the lease, a large amount of debris which was the result of illegal dumping by third persons.

When the lease was terminated and Schiavo surrendered the land to USG, Schiavo denied any duty to clear the debris from the land. It based its position on the terms of the 1966 lease, which made no provision for the cleanup of the property at termination; Schiavo contends that such a duty cannot be implied.

Plaintiff contends that Schiavo is in breach both of its express duty to surrender peaceably the property, and its implied duty, as lessee, to return the property in substantially the same condition which existed at the inception of the lease, reasonable wear and tear excepted.

Schiavo also filed a counterclaim against USG, pursuant to Fed.R.Civ.P. 13; this counterclaim arises from another lease between USG as lessor and Schiavo as lessee. This lease was signed in 1970, and concerned a tract of land adjacent to the property which was the subject of the 1966 lease between the parties. Schiavo alleges that USG fraudulently misled Schiavo with respect to the duration of this lease; it contends that it expended a large sum of revenue in the purchase of new equipment, and in improving a road leading to the property in reliance on USG's misrepresentation; Schiavo claims USG then wrongfully terminated the lease, causing damage to it.

The trial, which was non-jury, took ten days, eight of which were devoted to trial of the main claim. Following the trial, the parties submitted extensive briefs and requests for findings of fact and conclusions of law. Thorough oral argument was heard. We are now prepared to issue our Findings of Fact and Conclusions of Law, pursuant to Fed.R.Civ.P. 52(a).

With respect to the main claim, we find that plaintiff has failed to prove, by a preponderance of the evidence, that Schiavo is in breach of either an express covenant to peaceably surrender the property, or an implied covenant to return the land in substantially the same condition as existed at the inception of the lease, (reasonable wear and tear excepted). With respect to the counterclaim, we find that Schiavo has also failed to meet its burden of proof.

II. Findings of Fact — Main Claim:

We will present our findings of fact, made pursuant to Fed.R.Civ.P. 52(a), in narrative form:

A. Introduction:

USG is a corporation engaged in the manufacture of gypsum building products; it is incorporated in Delaware,

and its principal place of business is in Chicago, Illinois. Schiavo is in the business of waste disposal; its state of incorporation is Pennsylvania, and its principal place of business is located in Philadelphia. In January, 1966, the parties entered into a leasehold agreement for a tract of land located in Southwest Philadelphia which was owned by USG [2]; it is that lease which is the center of the dispute before us.

The leasehold property consisted of approximately 26 acres of territory, divided into two areas: Area A comprised slightly more than 23 of these acres, while Area B accounted for the remaining two-plus acres.[3] This property is adjacent to Essington Avenue, and covers both sides of 67th Street in Philadelphia, an industrial area in Southwest Philadelphia which is near the Philadelphia International Airport and consists of much undeveloped land.

B. Pre-1966 Background:

The primary benefit which USG derived, over the years, from its ownership of the leasehold property, was the disposal of the company's waste through the operation of a landfill on the property. USG has a manufacturing plant located in Philadelphia, which produces a great amount of waste material that must be eliminated; USG's ownership of the leasehold property provided the necessary means for this disposal. Prior to 1959, the property was entirely below grade, and was, therefore, suitable for a landfill operation. In summary form, this operation consists of dumping successive layers of waste in trenches dug on the land, and covering each layer with a layer of dirt;

2. The lease agreement was dated January 1, 1966.

3. Trial Exhibit P-1, which was admitted into evidence, is a survey of a portion of the City of Philadelphia, including the leasehold property. The parties have stipulated to the accuracy of this document.

this procedure is continued until the land is brought up to grade. In this fashion, a properly operated landfill can last for many years.

USG began to use the leasehold property for waste disposal approximately in 1959; USG leased Area B to a Mr. Archer, a waste hauler, who was to conduct a landfill operation on the property, using primarily USG waste material to bring the land up to grade; it took approximately one year to accomplish this. At that time, in 1960, Area B was leased by USG to a Mr. Spence and a Mr. Montgomery for the purpose of operating an automobile junk dealership on the property.

In the meantime, while Area B was being brought up to grade, USG also began to have its waste dumped on another part of the leasehold property; it leased a small section of Area A, which has been designated as Area F (this section has roughly the shape of a finger), to a Mr. Neely; Area F covers approximately 718 feet along Essington Avenue, to a depth of about 100 feet. Mr. Neely agreed to conduct a landfill on Area F, again using primarily waste material of the lessor, USG. When Area F was brought up to grade (within about a year), Neely began to operate a used truck business on the property, a use specifically permitted under the terms of his lease with USG.

In 1961, Neely had a heart attack, and he assigned his rights and obligations under the lease for Area F to Joseph Adiletto, who continued to conduct a used truck business on the land. Soon, however, Adiletto went beyond the uses permitted under the lease, and not only began to deal in automobile scrap himself, but also to sublet a part of Area F to two automobile junk dealers. When USG became aware of Adiletto's activities, it did not order removal of the junk car dealer operation, (Spence and Montgomery were already operating a junk car dealership on

Area B), but increased the rental which Adiletto was to pay under the lease. Thus, the junk car dealers continued to occupy Area F.

By 1963, however, USG had become very unhappy with the manner in which Adiletto supervised the junk car dealers. The junk cars had expanded beyond the boundaries of Area F, and were constantly sprawling onto Essington Avenue, a public thoroughfare. In addition, the property was generally in an unkempt condition, with junk scrap and debris spread throughout the area; this generally poor maintenance of the property had prompted frequent complaints from the City of Philadelphia. For these reasons, USG cancelled the lease with Adiletto in 1963.

Throughout this period, defendant Schiavo had been carrying on a waste haulage and landfill operation on a parcel of land which it owned, and which was adjacent to the USG property. The real estate business relationship between plaintiff and defendant began in 1963 after USG had terminated the Adiletto lease. Area F was then leased to Schiavo by USG;[4] USG believed that Schiavo would exercise more aggressive, and therefore, more effective supervision over the junk car dealers, and thus not only keep them within the confines of their areas, but also police them so that junk cars would not be placed on Essington Avenue.

The natural expansion of junk car dealers beyond their boundaries seems, however, to be an inevitable occurrence, and the junk car sublessees gradually began to encroach on Area A, beyond Area F. Rather than force the dealers back onto their property, seemingly a fanciful idea at best, USG agreed to lease to Schiavo a further part of Area A (beyond Area F), encompassing in part the land onto which junk dealers had expanded. This area, the

4. The date of this lease agreement was January 18, 1963.

subject of a second 1963 lease,[5] covered approximately 200 feet along Essington Avenue, to a depth of approximately 100 feet. Thus, after the signing of the second lease agreement, Schiavo had under lease from USG a section of Area A (encompassing Area F), extending a little more than 900 feet along Essington Avenue, to a depth of about 100 feet.

After the unhappy experience with Adiletto, USG had been somewhat wary of continuing to allow junk car dealers on the property; USG leased to Schiavo hoping that defendant would keep the property in better condition. While there is conflicting evidence on the extent to which this was accomplished, it is at least clear that Schiavo maintained the land in better condition than had Adiletto. Nevertheless, the junk car dealers were an extremely difficult group to control; Michael Schiavo, who was the president of Schiavo Brothers, Inc. from 1962 to 1968, would periodically instruct the junk car dealers to clean up their properties if the land had become too messy, and he would demand that they keep their goods within their particular boundaries. It was, however, a constant struggle.

Whatever the degree of success of Schiavo at the supervision of the subtenants, the evidence establishes that the City of Philadelphia did not want the junk car dealers on the land. The junk car operations produced recurrent fire calls which had to be answered by the City; they also produced several air pollution violations, the result of open burning on the land. Thus, in February, 1965, the City recommended to USG that the Schiavo lease be extended only on condition that the junk car dealers be removed from the land, and that a lease term be added which would specifically forbid the lessee from subletting to junk car dealers.

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5. This second 1963 lease was dated August 15, 1963.

USG, however, was advised by C.J. Mitchell Co., Inc. (Mitchell), its real estate agent with respect to the leasehold property, that Schiavo was making "a real effort to compel his tenants to operate according to the terms of the lease agreement." (Trial Exhibit D-94.) Mitchell counselled USG to oppose the City's attempts to eliminate the junk car dealers, this advice was followed by USG, culminating in the lease of January 1, 1966, which is now before us for interpretation.[6]

C. The 1966 Lease:

Before introducing the terms of the 1966 lease, it is necessary to summarize the basic nature of the business relationship between USG and Schiavo. We have noted that Schiavo, in leasing Area F and another part of Area A, acted as master tenant in trying to control the junk car sublessees. It is important to recognize, however, that this was merely a sideline operation for Schiavo; its main business was waste haulage. Because of USG's need to dispose of its waste, and Schiavo's obvious interest in generating revenue through the hauling of waste, the parties were able to maintain a healthy, symbiotic relationship. As we have noted, the leasehold property, owned by USG, was suited for a landfill operation because it was below grade; however, USG needed a dumping permit to be able to dispose of its waste on the property; Schiavo had such a permit. Similarly, Schiavo needed a landfill area into which it could dispose of the waste it hauled; it could not, however, run a landfill operation without a City permit; USG possessed this permit. In addition, USG desired to have the land brought up to grade, since this would increase its value; it was also to USG's benefit to have a tenant occupying the property, because vacant land would be

6. The 1966 lease was admitted as Trial Exhibit P-15.

highly susceptible to the illegal dumping of waste by outsiders (a phenomenon known as "fugitive dumping" or "short dumping"). So our Othello and Iago did indeed start off well.

In recognition of their mutual needs, USG and Shiavo, in January, 1966, entered into two separate contracts: a waste haulage agreement and a lease; it is only the latter document with which we are concerned in the matter before us. We note that this lease cannot be characterized in any sense as an adhesion contract: both parties were represented by counsel in the negotiation of its terms.

The leasehold property encompassed all of Areas A and B (including, of course, Area F, the subject of the first 1963 lease, and the other portion of Area A which had been the subject of the second 1963 lease). The 1966 lease superseded and terminated both 1963 leases between the parties.[7] USG terminated its lease with Spence and Montgomery which covered this property. Spence and Montgomery had, since the inception of its tenancy in 1960, been using the property for the operation of a junk car dealership, similar to the use to which Schiavo's subtenants had put Area F and the other portion of Area A. The remainder of the leasehold area, on Area A, was still below grade and suitable for landfilling. Thus, while the 1966 lease was designed primarily to memorialize Schiavo's future operation of a landfill on the property, the lease nevertheless encompassed, in part, areas which had already been brought up to grade, and which were being used as junkyard sites. The lease specifically provided for the further expansion of these junkyards as the land was

7. Due to an apparent typographical error in the 1966 lease, the two 1963 leases were not specifically cancelled. (See Trial Exhibit P-15, ¶ 23). The parties have stipulated, however, that both 1963 leases between the parties were cancelled by the 1966 lease. (Joint Request for Finding of Fact #13(a)).

gradually brought up to grade; paragraph 20 of the lease states, in relevant part:

> 20. Subject to the written approval of Lessor's Works Manager, Philadelphia Plant, which shall not be unreasonably withheld, Lessee reserves the right and privilege to sublet that portion of the subject premises already filled to grade level and of no use to Lessee in conducting a landfill operation, provided that subletting shall be only to so called "Automobile Wrecking Yards.

When Schiavo took over the tenancy of Area B under the 1966 lease, this property was not vacant; to the contrary, Spence and Montgomery had left a substantial amount of debris on the property upon vacating it. Thus, in order to prepare the land for the further subleasing to junk car dealers, Schiavo was forced to expand the sum of at least $2,500.00.[8] Schiavo initially attempted to recover this amount from USG, but USG directed Schiavo to pursue Spence and Montgomery under the terms of the 1966 lease, under which USG had assigned to Schiavo all rights to rent under the lease between USG and Spence and Montgomery. Since this assignment covered only rental rights, however, Schiavo could not force Spence and Montgomery to pay for the cleanup of the property.[9]

8. Schiavo contends that the total cost of this operation was $4,391.70. The evidence, however, does not sufficiently establish the accuracy of this amount. Trial Exhibit P-19, which is a document relating to the debris left on the Spence and Montgomery property, states that the cost to Schiavo was $2,500.00; at the bottom of this document there are several cryptic numerical amounts, one of which is 4391.70. We cannot decipher the meaning of this number; we, therefore, find that the cost was at least $2,500.00.

9. The Spence and Montgomery lease actually did not terminate until May 11, 1966, at which time Schiavo gained full control over Area B.

After negotiations between plaintiff and defendant, USG agreed to pay Schiavo a $1,400 rental credit for the cleanup of Area B. Since we find that Schiavo paid at least $2,500 to have the land cleared, defendant was not wholly compensated for the expense of removing the debris.

With the exception of those areas which were the sites of junkyards, the leasehold property was, in January, 1966, generally clear of debris, with the exception of some waste which was the result of fugitive dumping on the property.[10] During the term of the lease (which was a year-to-year lease, to be automatically continued unless terminated by either party), the land was developed as contemplated by the parties.[11] Schiavo, through the operation of the landfill, gradually brought the land up to grade; as a portion of Area A was raised to grade level, it would be sublet to an automobile junk car dealer. In the meantime, junk car dealers continued to operate on

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10. The evidence produced at trial established that the only effective means of preventing fugitive dumping was, in fact, to erect a chain link fence which would prevent outsiders from even entering onto the property. Fugitive dumping occurred during the entire course of the period from 1959 to 1974. The evidence showed, in fact, that fugitive dumping is virtually a custom with respect to vacant land, or land on which a landfill operation is in progress. As one witness eloquently put it:

> Nothing will stop anybody from dumping, as I said before. If you are going to dump, you are going to dump. There's nothing in the world to stop them. (Trial at 1.227.)

11. There was one modification to the lease. In 1968, the parties negotiated a rent reduction for the property. This reduction was based upon the facts that USG's waste removal requirements had declined, only a small percentage of the leasehold property was actually being used as a landfill, and the junkyards were not producing as much income as had been anticipated.

Areas F and B, and that portion of Area A which had housed these dealers before 1966. Needless to say, as the number of junk car dealers on the leasehold property increased, the number of junk cars on the property likewise increased. The general nature and upkeep of these junkyards was, however, gradually improved as the years progressed, for the reason that the junk car industry was generally improving its image; in addition, the City began to put greater pressure on the dealers to keep their properties clean.[12]

There was also evidence that Michael Schiavo made periodic efforts to keep the junk car dealers in line, and to force them to keep their properties clean. Along with his verbal attempts to control his subtenants, Schiavo also required each dealer, as part of the terms of his lease, to pay a security deposit to cover the cost of any rent deficiency, as well as the cost of any necessary cleanup at the termination of the dealer's lease.[13] Generally, if this escrow money was forfeited, it was for failure to pay rent,

12. One junk dealer succinctly stated the reason for the gradual change in image:

> It was going from an eyesore to where nobody wanted a junk car to where they realized they needed them. If you make it attractive and neat, you know, then you get more money for your merchandise, for one thing, and it's more desirable, a more desirable place to go. People is getting away from the dirty old image. (Trial at 1.41.)

13. During the period from 1966-69, the amount of this security deposit varied from $300-$500. In 1969, the amount was raised to $1,000.

In each of its subleases with the junk car dealers, Schiavo inserted a general cleanup clause, which stated:

> 4b4. The lessee agrees to keep the area clean, with no piling up of unnecessary old cushions, debris, etc., and clean off the lot upon vacating it. If the lessor must clean the lot the lessee will be charged.

although there was at least one instance in which it was forfeited for failure to clean up the property. Michael Schiavo also testified that if a sublease was terminated, and the dealer left debris on the property, Schiavo would bear the expense of cleanup; the purpose of the cleanup was primarily economic: Schiavo could not sublet a piece of land which was strewn with debris. Michael Schiavo testified that if another tenant was not coming onto property which a dealer had vacated, he would not clean up the property, and we accept this testimony.

In 1972, the landfill operation on the leasehold property was completed, and Schiavo continued its operations on the land only in its status as master tenant for the junk car dealers. After 1972, the number of dealers continued to increase, and the number of junk cars thus continued to multiply. In addition, the amount of debris left by fugitive dumpers increased after the close of the landfill, because Schiavo could no longer dump this waste in the landfill.

D. The Termination of the 1966 Lease and the Removal of the Subtenants:

The 1966 lease provided that either party could terminate the lease upon 120 days written notice; the lease was properly terminated by Schiavo on August 1, 1973, effective January 1, 1974.[14] The termination was acknowledged by USG by letter dated September 7, 1973; this letter, from Frank Hansen, Real Estate Manager of USG, to Schiavo, laid the groundwork for the saga that followed—the second paragraph reads as follows:

14. The August 1, 1973 letter was from John Lamb, President of Schiavo, to Roy E. Starner, Works Manager of USG's Philadelphia plant. Mr. Lamb became president of Schiavo in 1968, and remained in that position until mid-1973.

> You recognize, of course, that as lessee it is your obligation to surrender the premises on the termination date in substantially the same condition as at the commencement of the lease. Consistent with this obligation, we shall expect you to remove all wrecked or abandoned automobiles, trucks, parts and other debris prior to the termination date. (Trial Exhibit P-49).

We find that this was the first notice which Schiavo received from USG, setting forth that USG expected Schiavo, under the terms of the 1966 lease, to return the leasehold property free and clear of debris. The 1966 lease contains no clause with respect to the responsibility for cleanup of the property. In addition, no representative of USG informed Schiavo, prior to September, 1973, either orally or in writing, that cleanup would eventually be required of Schiavo at termination; the testimony reveals that the cause of this omission was USG's belief that such notice was unnecessary, since USG believed that Schiavo would be fully aware of its alleged responsibility for cleanup, despite the fact that there was no specific lease provision which spelled out this duty.

After notice of termination, USG informed Schiavo that USG did not want the junk car dealers to remain on the property, and directed Schiavo to terminate the leases of these subtenants. Accordingly, Francis Dougherty, real estate agent for Schiavo with respect to the leasehold property, gave written notice to the subtenants in October, 1973, that their leases would be terminated, effective December 31, 1973. No mention was made in this termination letter from Dougherty of the junk dealers' responsibility to clean up their properties pursuant to the specific terms of their leases.

The junk car dealers, a notoriously difficult group with whom to deal in any case, quickly objected to the short

amount of time which they had been given to vacate their premises. Basically, the stock in trade of an automobile junk car dealer is the metal scrap parts of the car; the tires and seats are generally worth little—it is the metal which has the value.[15] In October, 1973, the dealers were faced with an economically unenviable situation: they had been given a month and a half to negotiate new leases on another area or to go out of business, and they had to arrange to remove their inventory from the premises, either through transportation to another lease site, or through sale. In addition, sale of the inventory would be hampered by the fact that all of the dealers had to vacate, resulting in a large amount of scrap material being dumped on the market at one time.

Several of the junk dealers informed Dougherty that they could not possibly vacate their lots by December 31, and asked for an extension of time. They were informed by Dougherty that this was impossible; one of the dealers telephoned Mr. Hansen of USG to request an extension, but he was rebuffed. On December 1, 1973, Schiavo reaffirmed the December 31 date. However, only one of the dealers[16] vacated his lot on that date, and this dealer was forced to leave a great amount of valuable scrap

15. The value of the junk car metal to the dealers, despite its unsightliness, was colorfully explained by one dealer at trial:

> Let me explain something to you about junk cars. You know, it's just the animal itself. A junk car looks exactly like that, a junk car. To somebody that doesn't know anything about junk cars, it's an ugly sight, it really is. I mean, you know, there's nothing beautiful about a smashed automobile or an old scrap, an old piece of scrap. Now, to me that's money.
>
> THE COURT: To you it's beautiful.
>
> THE WITNESS: Right. To me that's a picture of beauty. I wish I had a billion cars out there. (Trial at 7.96.)

16. The dealer who vacated was Valentino Piacentino, Jr.

metal on the property because he had not had time to sell or remove it.

The other dealers formed an association to fight eviction; Schiavo began eviction proceedings immediately after January 1, 1974. A hearing was held in Municipal Court of the City of Philadelphia on March 4, 1974; at this hearing, the dealers were given a further 90 days from that date in which to vacate. While the Municipal Court eviction proceedings were technically a dispute between Schiavo and the junk dealer's association, counsel for USG sent an observer [17] to the hearing; he took no part in the proceedings, but was informed of the negotiations between respective counsel for Schiavo and the dealers on an ongoing basis. This agent of USG never objected to the extension of time given to the dealers.

In the meantime, USG had arranged for the sale of the leasehold property to Swann Oil Company (Swann), as part of the agreement of sale, dated January 18, 1974; closing was made conditional upon all debris being removed from the land. It was thus vital to USG's interests that the property be cleaned.

During the course of the summer of 1974, the junk car dealers gradually vacated the premises, either voluntarily or by eviction; by September, all of the dealers had left the property. A substantial amount of debris, however, remained on the property after the dealers had departed. The evidence shows that Schiavo did very little to force the dealers to obey the terms of their leases with respect to the cleanup of the property. Neither Dougherty, nor Lamb, nor William Breene (who became managing agent of Schiavo in April, 1974, and the president of the company in August, 1974), put great pressure on the dealers to clear off all the debris, although periodic visits were

17. This observer was Ralph M. Harter, who was an associate in the firm of Duane, Morris and Heckscher.

made by Lamb to the property; he would remind the dealers that it was their responsibility to clean up. In addition, Lamb provided the dealers with free trash barrels to encourage them to put the debris in these containers and then remove them. Schiavo and its agents were, however, primarily concerned with removing the *dealers themselves* from the land, which was in and of itself no trifling task.

It is highly speculative that any degree of pressure would have succeeded in forcing the dealers to remove all the debris. Testimony from several witnesses established that junk car dealers rarely, if ever, clean up their properties upon leaving; we have already noted that these dealers, were, in general, very difficult persons against whom to enforce obligations.

During the period when the dealers were vacating the premises, Schiavo denied that it was its responsibility to remove the debris left by the dealers, or the debris accumulated through fugitive dumping. As a result, in order to guarantee that the sale of the property to Swann would go through, USG was forced to hire a private contractor, George Hunter, to clear the debris. Hunter performed this work at a total cost of $144,500; the closing on the sale of the property to Swann was held on September 30, 1974.

E. Condition of the Leasehold Premises in 1974:

The principal factual disputes between the parties are the amount and nature of the debris, which was left on the property at the lease termination in 1974, as compared with that which was on the leasehold premises at the commencement of the lease in 1966. In addresing this question, we must separately consider the three sub-areas of the leasehold: 1) Area B, Area F, and that portion of Area A which had been the site of junk car dealerships

prior to 1966; 2) that part of Area A fronting on Essington Avenue, and back to a depth of approximately 100 feet—it is this section onto which Schiavo gradually extended its subleasing to junk car dealers; and 3) the back portion of Area A, behind the site of the junk car dealers—this area was not sublet to the dealers, even after the landfill was completed.

It is also necessary to distinguish between three types of debris: 1) junk car metal scrap, which was valuable inventory for the dealers, although it was just debris as far as USG and Swann were concerned; 2) tires and car seats, which comprised the main portion of the waste left on the property by the dealers; and 3) material from fugitive dumping, which took virtually every imaginable form, from watermelons to dead cats to junk car debris deposited by third persons.

When the property was cleared in 1974, there was debris spread generally throughout the leasehold area, with the exception of the areas of three or four dealers who had thoroughly cleaned their land. Of the material cleared, approximately forty percent was found on the front portion of the property, which had housed the dealers; the remaining sixty percent was cleared from the back portion of Area A. The front portion of the land (both Areas A and B) was virtually devoid of fugitive dumping material; it was almost entirely the residue of the junk car dealers' operations. Very little of this debris, however, was metal scrap; the dealers, with only minor exception, had taken their valuable metal scrap when they left, or had sold it.[18] Thus, the waste on the front portion of the land was principally automobile tires and seats.

18. USG, in attempting to prove the cluttered nature of the property in 1974, as opposed to its condition in 1966, places great reliance upon a series of photographs introduced at trial. Trial Exhibits P-30 and P-34 are aerial photographs of the leasehold property, the former taken in 1968, and the latter in 1971. These

The debris on the back portion of the land was made up of approximately eighty percent of the residue of the junk dealers whose waste had spread beyond their boundaries (again, principally tires and seats), and approximately twenty percent fugitive dump material.

Those sub-areas which had been the site of junk car dealers at the commencement of the lease were left, at the termination of the lease, in the same, or in cleaner condition than that which existed in 1966. There were two reasons for this: first, as noted earlier, *the image of the junk car industry was changing,* and dealers were generally more conscious of maintaining an orderly premises; second, and of greater significance, a shredding machine operation used by the dealers started to accept automobile seats in 1973; previously the machine had not been equipped to handle them. Thus, instead of allowing these seats to accumulate on the property, the dealers were able to bring them to the shredder and be paid for waste tonnage.

NOTE — *(Continued)*

photos serve principally to show the proliferation of junk car dealers on the property as the land was gradually brought up to grade. We have found that Schiavo subleased to more junk dealers as the landfill operation progressed; it is a natural incident of this increase in dealers that there be a coincident increase in the number of junk cars and debris, and it is this fact which is shown by P-30 and P-34.

Trial exhibits P-86 and P-86A consist of a series of photographs identified as depicting portions of the leasehold property taken during the summer of 1974 when Hunter was cleaning the property. While these photos show a substantial amount of debris on the property, they are somewhat misleading, in that they were obviously taken after Hunter had bulldozed the majority of the debris into huge piles preparatory to putting it into trucks. Therefore, these photos show, in essence, the total amount of debris cleared, and not the general nature of the property at the termination of the lease.

The rest of the leasehold area, both the front portion first sublet to junk dealers after 1966, and the back portion, had more debris on it in 1974 than it had in 1966; this conclusion is obvious, since we have found that this area was generally clear in 1966, with the exception of scattered fugitive dump material. Whatever debris was on the land in 1974 was therefore more than had existed when the lease term commenced. With respect to the front portion which were the subleased areas, however, we emphasize that the remaining debris was the residue of these junk car operations — debris which stemmed from the precise type of land development that had been contemplated by the parties to the 1966 lease.

III. Discussion:

The basis for federal jurisdiction in this case is diversity of citizenship between the parties. 28 U.S.C. § 1332. We are, thus, obliged to apply the substantive law which the courts of Pennsylvania would apply. *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

A. Pretrial Ruling on Parol Evidence:

As part of the final pretrial order, plaintiff indicated its intention to introduce evidence relating to the negotiations which led to the signing of the 1966 lease; specifically, plaintiff wanted to show the reasons why a specific cleanup clause did not become part of the lease. Defendant objected on the ground that this evidence was barred by the parol evidence rule; defendant contended that the lease was not ambiguous in any of its terms, and that it was not procured through fraud, accident, or mistake. Prior to trial, we ruled that all evidence of lease negotiations was inadmissible under the parole evidence rule; we now reaffirm that finding.

Under the parol evidence rule, when parties to a contract have reduced their agreement to a written form, and this writing appears on its face to be the entire agreement of the parties, evidence of prior or contemporaneous negotiations or agreements, which either vary or contradict that writing, is inadmissible. Furthermore, when the writing expressly states that it contains the entire agreement of the parties, it is conclusively presumed to do so, absent a showing that this integration clause was procured through fraud, accident, or mistake. *Gianni v. Russell & Co.*, 281 Pa. 320, 126 A. 791 (1924).

The lease in the instant case contains an integration clause which provides as follows:

> It is expressly understood and agreed by and between the parties hereto that this lease and the riders attached hereto and forming a part hereof set forth all the promises, agreements, conditions and understandings between Lessor or its Agent and Lessee relative to the demised premises, and that there are no promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth. It is further understood and agreed that, except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this lease shall be binding upon Lessor or Lessee unless reduced to writing and signed by them. (Trial Exhibit P-15, ¶ 17.)

Plaintiff does not contend that the lease is ambiguous as to any term, nor that fraud, accident, or mistake can be established; to the contrary, plaintiff's counsel admitted at oral argument following trial that the contract was unambiguous. Plaintiff contends, however, that because the lease is *silent* with respect to the cleanup of the property, that parol evidence is admissible to show the intent of the

parties on this issue. The short answer to this contention is that if it had been the intent of the parties specifically to provide for cleanup, a provision to this effect should have been inserted into the admittedly integrated lease document.[19] It is clear that evidence of intent with respect to the meaning of the contract terms is not admissible in the absence of ambiguity. *Pavlich v. Ambrosia Coal and Construction Co.*, 441 Pa. 210, 273 A.2d 343 (1971). As stated by the Supreme Court of Pennsylvania over twenty years ago:

> In interpreting this agreement it is our duty to attempt to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles [citations omitted]. In order to ascertain that intention "the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject matter of the agreement." [citations omitted]. However, that does not mean that where there is an integrated agreement. . . . evidence of the negotiations which have led to the formation of this integrated agreement is admissible to show an intent at variance with the language of the written agreement. . . .

Appeal of Edwin J. Schoettle Co., 390 Pa. 365, 372, 134 A.2d 908, 912 (1957).

In order to consider evidence of negotiations in the matter before us, we would have to find that *silence* with

19. To support its claim that the parol evidence should have been admitted, USG cites *Commonwealth v. Berger*, 11 Pa. Comm. 332, 312 A.2d 100 (1973). While evidence of lease negotiations was admitted in *Berger*, there is no indication that the contract before the court was an integrated document. The lease before us in the instant matter does, of course, contain an integration clause, and this is a crucially distinguishing factor.

respect to the responsibility of cleanup at the termination of the lease, amounts to an *ambiguity* in the contract. There is simply no basis for such a holding, nor does plaintiff contend there is. The lease, *which is an integrated document, and unambiguous in its terms,* must be interpreted within its four corners; the intent of the parties must be gleaned from the language of the lease. We, therefore, reaffirm our prior ruling on this issue, and hold that parol evidence with respect to negotiations leading to the signing of the 1966 lease agreement between USG and Schiavo was property excluded at trial, particularly, since that evidence would have added a material provision to the lease.

B. The Existence of an Implied Covenant:

The 1966 lease contained no provision requiring Schiavo to clean the land, or to return the leasehold property to USG free of debris. Therefore, the principal basis upon which USG relies in seeking recovery from Schiavo for the expense of clearing the debris is Schiavo's alleged breach of the implied covenant to return the leasehold premises in substantially the same condition in which it existed when received, reasonable wear and tear excepted. Under Pennsylvania law, this covenant exists even in the absence of an express covenant, *unless the implied covenant is negated by contrary language in the lease. Earle v. Arbogast,* 180 Pa. 409 (1897); *Patton v. United States,* 139 F.Supp. 279 (W.D.Pa. 1955); *Riverview Properties, Inc. v. United States,* 102 F.Supp. 934 (M.D.Pa. 1952). Plaintiff contends that the return of the property with junk car debris and fugitive dump material still on the land was a clear breach of this implied covenant. Before analyzing this contention, we must deal initially with Schiavo's claim that this implied covenant was negated by the terms of the lease.

Defendant avers that the integration clause in the lease precludes the finding of any implied covenant. Since this clause provides that no agreements or conditions exist outside the terms of the lease, argues Schiavo, we cannot place any greater duties upon it beyond those which are specifically delineated in the written contract. Defendant contends that the integration clause provides language contrary to any duty to return the premises in the same condition, reasonable wear and tear excepted, and that this implied covenant has thus been expressly negated.

We do not believe that this argument withstands analysis. We have noted that the intent of the parties with respect to the meaning of the lease terms must be determined from the face of the document. The integration clause, in relevant part, states as follows:

> [T]here are no promises, agreements, conditions, or understandings, *either oral or written*, between [the parties] other than are herein set forth. (Emphasis supplied.)

The obvious intent of this language was to preclude the introduction of parol evidence with respect to negotiations and agreements which are not incorporated in the contract. This is the generally recognized purpose of such an integration clause. An implied covenant, however, cannot be characterized as an "oral or written" agreement or understanding; we believe that the insertion of these words makes it clear that the negation of any implied covenant which might otherwise adhere was not within the contemplation of the parties in drafting the integration clause. *Cf. City of Philadelphia v. Page*, 363 F. Supp. 148 (E.D. Pa. 1973), in which the court held that the implied warranty of habitability was not negated by a clause which stated that the delineated express warranties were the only warranties to which the seller would be bound.

In seeking to negate the existence of the aforementioned implied covenant, Schiavo advances the following points: 1) the lease term specifically permitting subleasing to junk car dealers, did not mention any cleanup duty, thus negating any finding of an implied covenant to return the premises as received, reasonable wear and tear excepted; and 2) the express duty in the lease requiring peaceable surrender of the premises at the termination of the lease precludes a finding of any further implied duty.[20] We summarily reject both of these contentions. With respect to the first, the mere fact the lease directs that a specific use be made of the property simply does not establish that the parties intended to relieve the lessee of the duty to rectify the consequences of that use. This clause cannot be interpreted as language contrary to the existence of the implied covenant.

The second of Schiavo's contentions is refuted by the reasoning in *City of Philadelphia v. Page, supra;* the fact that the parties resolved to memorialize one termination duty does not evidence an intent to reject another duty of a different nature. Defendant argues that the insertion of an express covenant excludes a contradictory, implied covenant. *Brimmer v. Union Oil Co.*, 81 F.2d 437 (10th Cir.), *cert. denied*, 298 U.S. 668 (1936). We do not believe, however, that a duty to deliver land at the termination of a lease is contradictory to a duty to deliver that land in a certain condition. The covenants are separate and distinct.

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20. Schiavo also contends that the previous dealings between the parties, and specifically the inclusion of a cleanup clause in the two 1963 leases, negates the finding of an implied covenant with respect to the 1966 lease. However, in interpreting the language of the 1966 lease within its four corners, we have not considered evidence with respect to the prior negotiations or dealings between the parties.

Having found no language to the contrary in the 1966 lease, we hold that the defendant had a duty to return the leasehold premises to USG at the termination of the lease, in substantially the same condition as existed at its inception, reasonable wear and tear excepted.

C. Breach of the Implied Covenant:

In determining whether Schiavo is in breach of this implied covenant, we must separately consider three areas of the leasehold property: 1) the area previously leased to junk car dealers; 2) the area landfilled and sublet to dealers during the term of the lease; and 3) the back portion, landfilled but not leased to dealers.

(i) The Area Previously Leased to Junk Car Dealers

At the commencement of the leasehold term in 1966, Area B, Area F, and another 200 foot portion of Area A adjoining Area F, had been the site of junk car dealers for several years. We have found that, as a result of these operations, there was a substantial amount of debris and junk cars already on the property at the execution of the lease in 1966. Furthermore, we have found that at the termination of the lease, this portion of the property was left by Schiavo in either the same, or in better condition than that in which it had been in 1966. It is therefore obvious, based upon these findings, that Schiavo did not breach its implied covenant with respect to these areas. The land was returned in substantially the same condition as that which existed when received, reasonable wear and tear excepted.

(ii) The Area Sublet to Junk Car Dealers for the First Time During the Leasehold Term

We have found that the portion of Area A not previously leased to junk car dealers at the commencement of

the lease was generally clear of debris at that time, with the exception of some fugitive dump material. The part of this property fronting on Essington Avenue to a depth of approximately 100 feet as it was gradually raised to grade level during the lease term, was sublet to dealers. As a result of these operations, a substantial amount of junk car debris, principally tires and some car seats, was left on the property at the termination of the lease. USG vigorously contends that the failure of Schiavo to clear this debris off the property was an obvious breach of Schiavo's implied covenant; the accumulation of rubbish to this degree, contends plaintiff, cannot be considered "reasonable wear and tear." *We find, however, that USG has failed to meet its burden of establishing that, in the context of the junk car industry, the wear and tear to the land was excessive or unreasonable.*

It is of cardinal importance to note that USG specifically approved subletting of the leasehold property by Schiavo to junk car dealers, as the property was filled to grade. Therefore, while this portion of Area A was vacant in 1966, *the land was developed in the precise manner contemplated by the 1966 lease.* In determining that wear and tear which is "reasonable", we must consider the use to which the property was put, a use which, in this case, was agreed to by the landlord. In *Codman v. Hygrade Food Products Corp.*, 295 Mass. 195, 3 N.E. 2d 759 (1936), the court was confronted with a lease which, by its terms, required the lessee to return the property (a building) in "good tenantable repair." Interpreting this term, the court stated:

> The phrases "in good tenantable repair" and "in good condition" appearing in such a lease do not have a fixed or technical meaning which is always the same regardless of the character or use of the building to which they refer. A building adapted for use as a

> tannery might be in good condition for that purpose and absolutely untenantable for use as a watch factory. In the application of phrases of such general significance to a building which is the subject matter of a lease various things are to be taken into account. Among these are . . . the use to which the building is to be put and the character of a business there to be carried on [citations omitted]; . . . and the class of tenant and the kind of business of a tenant who would be likely to lease the building (citations omitted].

3 N.E.2d at 760.

We believe this reasoning is apposite to the facts of this case. *We, therefore, reject plaintiff's argument that because the land was vacant when leased, we must consider only what is reasonable wear and tear to vacant land; USG cannot consent to a specific use of its property, and then ask this court to ignore the natural consequences of that use.*[21] *We cannot determine that "wear and tear"*

21. One of the principal cases relied upon by USG, *U.S. v. Jordan*, 186 F.2d 803 (6th Cir.), *aff'd per curiam*, 342 U.S. 911 (1951), is distinguishable from the case at bar. In *Jordan*, the government temporarily condemned certain private lands, and leased others, for use as a gunnery range; following the return of the land to the property owners, they sued for damage to the standing timber caused by the lodging of bullets in the trees; the owners argued that the compensation awards and lease rentals were not sufficient to cover this damage. The government argued that because the intent of the government was to use the land as a gunnery range, the lodging of bullets in the timber was the consequence of the normal use of the property. In rejecting this argument and affirming the district court's award of damages to the landowners, the court stated, *inter alia*:

> The extremely low rental which was paid [under the leases], in some instances as low as fifty cents an acre, strongly supports the ruling that timber damage was not included in the rental figure.

which is "reasonable" without considering the nature of the business conducted on the land.[22] While USG was primarily interested in the use of the property as a landfill, the parties agreed in the lease that Schiavo could sublet to the dealers after the land was raised to grade. It is an understatement to say that the establishment of junk car dealerships is not the most elegant use to which land may be put. The uncontradicted evidence produced at trial established that junk car dealers were, in general, an extremely difficult group with whom to deal; that it was an arduous, if not impossible, task to keep them within the bounds of their obligations; that there was a natural expansion of debris beyond their lease boundaries; and that upon termination of a junkyard lease, the dealer rarely, if ever, cleared the property of accumulated debris beyond removing the scrap metal which could be sold. USG, in fact, suffered this experience with Spence and Montgomery, who failed to clear Area B at the termination of the 1960 lease covering that property; as a result, Schiavo was forced to remove the accumulated debris before it could relet the premises to other dealers.

NOTE — *(Continued)*

Id. at 806. In the case at bar, there is not sufficient evidence to support an inference that the rental fee was so low that the parties clearly did not contemplate that USG would bear the cost of cleanup.

22. Plaintiff produced the testimony of a real estate expert, Charles A. Thomas, who stated that the debris left on the property by Schiavo diminished the value of the land with respect to the "highest and best use" of the land. This issue, however, is not before us; we must determine what is reasonable wear and tear to the land with respect to the operation of a junkyard, for this was the use to which the parties agreed. It is undisputed that the debris diminished the value of the property with respect to the use to which Swann wished to put it. *See, Getty Oil Co. v. Mills,* 204 F.Supp. 179, 197 (W.D.Pa. 1962); *Codman v. Wigrade Food Products Corp.,* 295 Mass. 195, 3 N.E.2d 759 (1936).

Initially, it is clear that the *accumulation* of debris on this portion of the leasehold property was not more than reasonable wear and tear in the context of the junk car industry. The evidence established that in the later years of the lease term the general condition of the dealers' properties improved, due both to the industry's goal to improve its image, and to the fact that the shredder began to accept car seats.

Second, with respect to the *failure to clear the debris* at the termination of the lease, we find that USG has failed to prove by a preponderance of the evidence that this condition was more than reasonable wear and tear to junkyard property. The evidence shows that the dealers virtually never cleaned their properties upon leaving, despite their standard lease obligation to do so. We cannot ignore this evidence. When the lease was executed in 1966, both parties had had experience with junk car dealers; nevertheless, no provision was made in the lease with respect to the responsibility for clearing the debris which the dealers would inevitably produce. We cannot *imply* an obligation to return land wholly free of debris, when the evidence provides no support for a finding that junkyard property would normally be returned in this condition. *We cannot simply assume in a vacuum that no one would ever expect leased land to be returned covered with debris, and that this condition is therefore, necessarily, unreasonable wear and tear as a matter of law. It is the record, and not our assumptions, which must support any such finding, and the record in this case fails to provide this foundation.*[23] *We, therefore, hold that with*

23. USG argues that Schiavo's inclusion of a cleanup clause in all of the subleases with the dealers, as well as Schiavo's periodic demands that the dealers keep the land in good condition, is probative evidence with respect to Schiavo's understanding of their responsibility to return the land clear of debris, and of the inten-

respect to that portion of the leasehold property first leased to junk car dealers during the term of the lease, Schiavo returned the land in substantially the same condition as existed when it received the land, reasonable wear and tear excepted.

(iii) The Back Portion of the Leasehold Property:

The back portion of Area A, which was not leased to junk car dealers, nevertheless was left with a substantial amount of debris on it, both from dealers who expanded their materials beyond their boundaries, and from fugitive dumping. In determining whether Schiavo is in breach of its implied covenant with respect to this area, we must differentiate between these two categories of debris.

(a) Junk Car Debris:

Concentrating first upon the debris which was the result of the junk car operations on the front portion of

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NOTE — *(Continued)*

tion of the parties to the lease that cleanup was Schiavo's responsibility. While we will consider the evidence on this issue, *see, Wigmore, Evidence,* 3d Ed. 1940, § 377, we do not believe, in light of the entire record, that this evidence shows any "understanding" on Schiavo's part of their responsibility to USG for cleanup. Schiavo was interested in generating more revenue from the land, and it was therefore in its interest to rent to the dealers for this purpose. If a dealer vacated his property, or was evicted, it would be easier to rent the land to another dealer if the property were left clean. Additionally, we have found that the City of Philadelphia wanted the dealers out of the area because their operations created an eyesore; therefore, to the extent that Schiavo could encourage the dealers to keep their areas orderly, it might well do so to prevent harassment from the City. Therefore, both the cleanup clauses in the lease, and Schiavo's periodic demands to the dealers to keep their areas neat, were beneficial to Schiavo's own immediate economic interest. Accordingly, this evidence is of very little weight in proving any responsibility for general cleanup at the termination of the main lease.

Area A, we again emphasize that the 1966 lease specifically permitted junk car operations on *all of the leasehold property*. While Schiavo did not specifically lease the back portion to dealers, it could have done so. Furthermore, we have found that junk car dealers naturally expand beyond their boundaries onto any available land; the accumulation of debris on the back area was neither unexpected nor unreasonable in the context of the junk car industry. Because the 1966 lease approved the expansion of dealer operations onto the entire leasehold property, the accumulation of debris on the back area was not a use contrary to lease provisions. Therefore, based upon the reasoning in the previous section, we again find that plaintiff has failed to prove, on the record before us, that the accumulation of junk car debris was, in the context of this industry, unreasonable wear and tear to the land. Accordingly, we find that USG has not established a breach by Schiavo of the implied covenant with respect to the dealers' debris left on the back portion of the property.

(b) Fugitive dumping:

The evidence produced at trial revealed that fugitive dumping was a normal incident of vacant property; illegal dumping had been occurring on the leasehold property for many years prior to the lease, and it continued on the back portion of the property throughout the term of the 1966 lease. There is, however, a critical distinction between the accumulation of junk car debris, and the accumulation of fugitive dump debris: *fugitive dumping was not contemplated by the parties to the 1966 lease.* While its occurrence may not have been unexpected, provision was obviously not made in the lease for fugitive dumping. USG cannot be held to have approved of the accumulation of this type of debris; indeed, we must consider this wear and tear to the land *as if the lease had been for vacant*

land. Under these circumstances, we believe that the amount of fugitive dump material which was left on the land at the termination of the lease was unreasonable wear and tear to the land. *Despite this finding, however, plaintiff has not proven that Schiavo is in breach of the implied covenant, because USG has failed to prove that the accumulation of this debris was caused by the negligence of defendant; we find that under Pennsylvania law, negligence is a required element in proving a breach of the implied covenant to return leasehold property in substantially the same condition as when received, reasonable wear and tear excepted.*

USG argues strenuously that no proof of negligence is required to establish a breach of the implied covenant; it is, USG avers, only the condition of the land, and not the acts or omissions of the defendant which may have caused that condition, which we must examine in this case.

To determine whether negligence is an element of breach of this implied covenant under Pennsylvania law, we must focus upon the seminal case in this area. In *Earle v. Arbogast,* 180 Pa. 409, 36 A. 923 (1897), the court stated in relevant part:

> Generally, in the absence of an excess covenant on the subject, the law implies a covenant on the part of the lessee so to treat the demised premises that they revert to the lessor unimpaired, except by usual wear and tear, *and uninjured by any willful or negligence act of the lessee.* The implied covenant does not, however, extend to the loss of buildings by fire, flood, or tempest, or enemies, which it was not in the power of the lessee to prevent, and there is no implied covenant that the lessee shall restore buildings which have been destroyed by accident without fault on his part. (Emphasis supplied.)

USG argues that this language supports the creation of *two* covenants: 1) a covenant to leave the premises unimpaired except by usual wear and tear; and 2) a covenant to leave the property uninjured by any willful or negligent act of the lessee. The latter covenant, which requires proof of negligence, is only applicable, avers USG, in situations in which damage has been caused by a sudden and singular incident, such as a fire or explosion; the former covenant applies to normal use, as in the case at bar, and does not require proof of negligence.

While the language in *Earle* is somewhat ambiguous, we do not believe these words may fairly be interpreted to create two covenants; no case subsequent to *Earle* supports such a reading. In 22 P.L.E. Landlord and Tenant § 237, the implied covenant is expressed as follows:

> Even in the absence of an express covenant, there is an implied obligation on the part of a lessee to treat property leased in such a manner that no injury is done to the inheritance, and to return the property to the lessor in as good condition as when received, ordinary wear and tear excepted. *However, a lessee may not be liable for damage and failure to return the premises as leased, in the absence of proof of negligence.* (emphasis supplied).

Likewise, in 51 C.J.S. Landlord and Tenant § 408, only one covenant is stated, with negligence a required element:

> Independently of express covenant, the law imposes on a tenant the obligation to return the premises at the termination of the tenancy substantially in the same condition as when he received possession, and to restore the property to the landlord at the end of the term unimpaired by the negligence of the tenant.

Based upon this authority, and upon our own reading of the Earle opinion, we reject plaintiff's argument on this issue. We believe that Pennsylvania law recognizes only a single implied covenant to return property substantially in the condition received, and that to prove a breach of this covenant, the landlord must prove that the damage to the property was caused by the negligence of the tenant. See, Mumma v. Club Plan of America, 6 D. & C.2d 266 (Dauphin County 1955); *See also, Womack v. Tripp,* 137 S.W.2d 180 (Tex. Civ. App. 1940); *Arkansas Fuel Oil Co. v. Connellee,* 39 S.W.2d 99 (Tex. Civ. App. 1931).

The record fails to establish any negligence of Shiavo with respect to the accumulation of fugitive dump debris on the back portion of the land. We have found, as the record clearly reveals, that it was virtually an impossible task to prevent fugitive dumping on the vacant areas. In an attempt to control the constant fugitive dumping, Schiavo hired a twenty-four hour watchman to patrol the premises. Schiavo made frequent reports to the police, and sought assistance from the Police Department to prevent the illegal dumping; there were also wooden barricades erected to prevent access to the property, but these were easily bypassed by the fugitive dumpers. While these measures were not successful, they conformed to the standard which a reasonable man would exercise under similar circumstances; Schiavo was, therefore, not negligent. *Gift v. Palmer,* 392 Pa. 628, 141 A.2d 408 (1958). The evidence demonstrated, in fact, that the only means of assuring an end to fugitive dumping was the erection of a chain link fence, at an estimated cost of approximately $50,000. Barring any provision in the lease requiring Schiavo to do so, it is clear that Schiavo was under no duty to USG to expend such a large sum; indeed, USG does not even allege that Schiavo had this duty. *See, Long v. Fitzsimmons,* 1 WSS E.30 (Pa. 1841).

Therefore, we hold that with respect to the accumulation of fugitive dump debris on the back portion of Area A, that while the land was returned by Schiavo to USG in a condition in which there was unreasonable wear and tear, USG has failed to establish that this damage was caused by Schiavo's negligence; plaintiff, accordingly, has failed to prove a breach of the implied covenant.

D. Breach of the Express Covenant to Surrender the Premises Peaceably at the Termination of the Lease.

USG's final ground upon which recovery is sought may be dismissed summarily. USG contends that the return of the leasehold property by Schiavo in a littered condition constituted a breach of the specific lease obligation to surrender the premises peaceably. (Lease ¶ 4(d)). USG argues that the debris on the property prevented it from exercising dominion and control over the land and this establishes a breach of the express covenant to surrender peaceably. We have already noted, however, that the covenant to surrender land peaceably is distinct from the covenant to surrender land in a certain condition. See Section III(B), *supra*. Schiavo peaceably returned the land in the condition required by the implied covenant to return the land in substantially the same condition as when received, reasonable wear and tear excepted. In the cases cited by plaintiff on this issue, the tenant was under an *express duty* to remove possessions from the property. *Abrams v. Sherwin*, 86 Pa. Sup. 189 (1925); *Ide v. Finn*, 196 App. Div. 304, 187 N.Y.S. 202 (1921); *Mott. Pipe & Supply Corp. v. Blue Ridge Coal Corp.*, 208 Misc. 601, 146 N.Y.S. 2d 607 (N.Y.Mun.Ct. 1955). In the case at bar, defendant had no express obligation to remove the debris; rather, Schiavo had only an implied duty with which, we have found, it complied.

We, therefore, find that the defendant did not breach the express covenant to surrender the premises peaceably.

Finally, plaintiff argues that because the debris diminished the value of the land, Schiavo committed waste to the property. This argument, standing alone, is clearly untenable. In determining whether waste has been committed, a court must consider the nature of the lease, and the reasonableness of the use made of the premises under the lease. 78 Am. Jur. 2d, Waste § 1; Stern, *Trickett on the Law of Landlord and Tenant* § 62. The use to which Schiavo put the land was not unreasonable under the lease; rather, it was *specifically approved* by the lease. The debris was a natural incident of the business of junk car dealerships. Therefore, whether this debris diminished the value of the land with respect to some other purpose for which USG might subsequently desire to use the property, is not relevant *in determining whether Schiavo committed waste under the 1966 lease.*

IV. Findings of Fact—Counterclaim:

The genesis of the counterclaim is a lease between USG and Schiavo dated July 20, 1970. Under this agreement, USG leased to Schiavo a 12.2544 acre tract of land adjacent to Areas A and B, and fronting on the Schuylkill River; this tract has been designated as Area C. This land was below grade and thus available for a landfill operation. By 1970, Area A had been nearly raised to grade, and it was clear to the parties that Area A would only be available as a landfill for a short time longer.[24] Both parties were interested in continuing their business relationship, which involved both landfilling and waste haulage; thus, after USG had obtained a zoning permit allowing Area C to be used for landfill purposes, the parties entered into the 1970 agreement. The 1970 lease was, in all ma-

24. Area A was subsequently closed as a landfill in 1972.

terial respects, virtually identical to the 1966 lease for Areas A and B.[25] The agreement was to continue from year-to-year, and could be terminated by either party upon 120 days written notice.

The subject matter of the dispute on the counterclaim concerns the alleged wrongful termination of the lease by USG in April, 1972, after the property had been sold by USG to Swann Oil Company (the same corporation which subsequently purchased Areas A and B). Schiavo alleges that it was assured by USG during 1970 and 1971 that the property would not be sold until the landfill operation was completed, and that based upon these assurances, Schiavo expended approximately $200,000 in building an access road to Area C, and in purchasing new landfill equipment to be used in that area.

The original expectation of the parties was that Area C would be available as a landfill area for approximately two years; however, new technology and new equipment in the field convinced Schiavo that the period could be extended to approximately four years. It was believed by Schiavo that it was in the interest of both parties to extend the life of the landfill for as long as possible. Nevertheless, USG had had the property available for sale since 1966, a fact of which Schiavo was aware.

Initial consideration was given by Schiavo to the purchase of new landfill equipment early in 1970, *prior to the execution of the lease for Area C*. At that time, John Lamb, president of Schiavo, sought assurance from USG that the landfill property would not be sold until it had been raised to grade, and that the purchase of the equipment would be a worthwhile investment for Schiavo. It is not clear from the record whether Lamb was inquiring only about Area A, on which the landfill operation was

25. The 1970 lease was admitted at trial as Trial Exhibit P-31.

presently proceeding, or also about Area C, on which the parties anticipated continuing the landfill.

John Lamb testified that in seeking reassurance from USG, he spoke to Roy Starner, the US· Philadelphia plan manager; Lamb told Starner that he was "thinking" about purchasing the equipment, and "wanted to feel comfortable" as far as the continuation of the landfill was concerned. Starner responded that he would check with USG's main office in Chicago; approximately a week later, Starner telephoned Lamb, and told him that "as far as I can find out and as far as I know, there is absolutely nothing in the wind with respect to a prospective buyer or the sale of that land." (Trial, 9.100.) When the lease was executed in July, 1970, however, there was no provision made guaranteeing the completion of the landfill. Indeed, Schiavo made no objection to the provision in the lease permitting termination upon 120 days notice. While the record is not entirely clear on precisely when Schiavo purchased the new equipment, it was apparently not until after the lease for Area C was signed by the parties; the cost of the equipment was approximately $100,000.

When the lease for Area C was executed in 1970, a problem existed with respect to access to that area; there was no public thoroughfare running to the property. There were only two means of access: 1) across Area A, and over railroad tracks which separated Areas A and C; [26] and 2) over a rough, dirt roadway which ran to Passayunk Avenue, a distance of approximately three tenths of a mile.[27] Schiavo originally hoped to reach Area C with its

26. These railroad tracks were owned by the Penn Central Transportation Company.

27. This road is no longer the only access to Area C. In 1973, the City of Philadelphia opened 67th Street, which in 1970 was only a paper road. 67th Street, a public thoroughfare, now provides full access to Area C.

equipment by traveling through Area A; however, it was soon discovered that the equipment was too heavy to operate across the recently landfilled Area A, and, in addition, the landfill vehicles could not maneuver the incline over the railroad tracks. Schiavo then attempted to reach Area C by means of the unfinished access road from Passayunk Avenue; this also proved unfeasible, due to the weight of the equipment.

Confronted with this situation, Schiavo considered the possibility of improving the Passayunk Avenue road to permit the movement of heavy equipment upon it. As this operation involved a substantial expense, however, Lamb, in early 1971, again sought assurance from USG, specifically from Starner, that Area C would not be sold in the near future, but would be available for the life of the landfill. Starner again checked with USG's main office in Chicago, and again told Lamb that as far as Starner could determine, there was no immediate plan to sell the property. We find, however, that *no specific promise or assurance* was given by USG to Schiavo that the property would not be sold. Starner's statements to Lamb relative to the sale of the property were clearly not absolute; they contained the obvious disclaimer that Starner had only checked "as far as he could determine." Schiavo neither sought, nor received, any written assurance that the property would continue as a landfill. In any case, following the discussion between Lamb and Starner, Schiavo improved the access road from Passyunk Avenue; this was done in early 1972.[28] The improvement of the road increased the value of Area C to some degree, since it provided immediate and functional access to the land.

28. The land upon which this road was built was owned by the Penn Central Transportation Company. It appears that Schiavo built the road without obtaining any permit to do so from Penn Central.

USG began initial negotiations with Swann Oil Company for the sale of Area C during July or August of 1971; these negotiations became serious sometime during December, 1971, and January, 1972; an agreement of sale was signed by USG and Swann in February, 1972. During the course of these negotiations, Swann requested that USG keep the potential sale confidential; consequently, USG did not inform Schiavo of the possibility that Area C might be sold to Swann. However, at a luncheon meeting on December 2, 1971, attended by Lamb, Starner, and Frank Hansen, the Real Estate Manager of USG, Lamb was informed by Hansen that there was "interest to sell this property." (Trial Exhibit P-37.) At this meeting, Hansen informed Lamb that USG would keep Lamb abreast of any developments with respect to the land. We find again, however, that no absolute assurance of communication was given by Hansen; in particular, Hansen made no commitment which would include a breach of the duty of confidentiality which USG owed to Swann.

Following the sale of Area C to Swann, USG on April 5, 1972, gave proper notice of termination of the 1970 lease; the termination was to become effective July 6, 1972. (Trial Exhibit P-35.) During the period following notice of termination, Schiavo accelerated the landfill operation on the property. As a result, when the termination became effective and Schiavo vacated the land, we find that Area C was raised to grade, and in fact, was slightly above grade.

V. Discussion of the Legal Issues:

Schiavo contends that the alleged misrepresentations of USG with respect to the potential sale of Area C give rise to causes of action for: 1) unjust enrichment; 2) equitable estoppel; and 3) deceit. We find these contentions to be without merit on the record before us.

A. Unjust Enrichment:

Under Pennsylvania law, to recover under the equitable doctrine of unjust enrichment, plaintiff must prove two elements: *first*, an enrichment to another; and *second*, a resulting injustice if recovery for the enrichment is denied. *Meehan v. Cheltenham Township*, 410 Pa. 446, 189 A.2d 593 (1963); *Bailis v. Reconstruction Finance Corp.*, 128 F.2d 857 (3d Cir. 1942).

Initially, we note that unjust enrichment in the matter before us can only apply to the building of the road, since USG clearly received no benefit from Schiavo's purchase of new equipment. With respect to the road, Schiavo avers that the road benefitted USG by solving the problem of access to Area C, and thus making the property more easily saleable. Schiavo further contends that USG's retention of this benefit, without payment to Schiavo for the cost of building the road, is unjust, because USG fraudulently induced Schiavo to build the road by informing Schiavo that there were no immediate plans to sell Area C.

While it is true that USG received some benefit from the building of the road, it is clear beyond peradventure that it is not unjust for USG to retain this benefit. In the *first* instance, USG did not fraudulently induce Schiavo to improve the road; this was entirely Schiavo's own business judgment. While Lamb sought reassurance from USG that the land would not be sold, the response from Starner, on behalf of USG, was far from absolute. There was simply no guarantee given, nor would a reasonable man have interpreted Starner's words as a guarantee. *Second*, the lease contained a clause permitting termination upon 120 days notice. Schiavo, a sophisticated corporation, knew the terms of this lease, and cannot complain that it was legally enforced to its alleged detriment. *Third*, the record shows that no misrepresentation was

in fact made; Lamb inquired about potential sale in early 1971, and the road was built at that time; negotiations with Swann did not commence until July or August of that year. Therefore, USG did not mislead Schiavo when Starner informed Lamb that there were no immediate plans to sell the property. *Fourth*, the record shows that Schiavo in fact received full benefit from the road; the road was built to provide access for a landfill operation. When the land was vacated by Schiavo, the land had been brought up to grade, and, therefore, the landfill was completed.

Based upon these findings, we hold that Schiavo has failed to prove a cause of action for unjust enrichment.

B. Equitable Estoppel:

Under the second head of Schiavo's claim for recovery, Schiavo seeks to apply the doctrine of equitable estoppel. Schiavo contends that USG should be estopped from exercising the right of termination under the lease without compensating Schiavo for the equipment and the road.

The elements of equitable estoppel were succinctly stated by the Supreme Court of Pennsylvania in *Northwestern Nat. Bank v. Commonwealth*, 345 Pa. 192, 27 A.2d 20, 23 (1942):

> Equitable "estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. In this situation, the person inducing the belief in the existence of a certain state of facts is estopped to deny that the state of facts does in truth exist, aver a

> different or contrary state of facts as existing at the same time, or deny or repudiate his acts, conduct, or statement."

See also, Blofsen v. Cutaiar, 460 Pa. 411, 333 A.2d 841 (1975).

Again, Schiavo has clearly failed to prove the elements of this cause of action with respect to either the road, or the equipment. *First,* USG made no misrepresentation, since negotiations with Swann did not commence until after Starner's "reassurances" to Lamb. *Second,* Schiavo did not rightfully rely on any representations which were made with respect to potential sale of the land, since the statements were not absolute and contained an obvious disclaimer. Moreover, Schiavo was fully aware of the terms of the lease, including the termination clause. We hold that judgment must be rendered against Schiavo on this cause of action.

C. Deceit:

Finally, Schiavo argues that the actions and misrepresentations of USG constitute a cause of action for the tort of deceit. The elements of this action under the law of Pennsylvania are: 1) a misrepresentation; 2) a fraudulent utterance thereof; 3) an intention that another person will thereby be induced to act, or to refrain from acting; 4) justifiable reliance by the recipient; and 5) damage to the recipient. *Savitz v. Weinstein,* 395 Pa. 173, 149 A.2d 110 (1959). *See also, Thomas v. Seaman,* 451 Pa. 347, 304 A.2d 134 (1973).

We need go no further than an examination of elements (1) and (4) to find that Schiavo has not proven a cause of action for deceit. We have already determined that USG made no misrepresentation, and in any case, Schiavo did not justifiably rely upon any representation

which was made. Judgment must, therefore, be rendered aganist Schiavo on this final cause of action.[29]

An appropriate order will issue.

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29. Schiavo argues that misrepresentations were also made by USG, through Hansen, at the meeting of December 2, 1971. However, we do not consider this meeting relevant to the issues before us, since by that time, in December of 1971, Schiavo had already purchased the new equipment, and had already built the road.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-3165

UNITED STATES GYPSUM COMPANY

v.

SCHIAVO BROTHERS, INC.

ORDER

[Entered May 18, 1978]

AND NOW, this 1st day of May, 1978, after trial of the above captioned matter without a jury, consideration of the briefs and oral arguments of counsel, and for the reasons cited in the accompanying Opinion, it is hereby Ordered, Adjudged and Decreed that Judgment is hereby entered in favor of SCHIAVO BROTHERS, INC. and against UNITED STATES GYPSUM COMPANY. On the counterclaim of SCHIAVO BROTHERS, INC. against UNITED STATES GYPSUM COMPANY, Judgment is hereby entered in favor of UNITED STATES GYPSUM COMPANY and against SCHIAVO BROTHERS, INC. Each party shall bear its own costs.

BY THE COURT:

/s/ HERBERT A. FOGEL
Herbert A. Fogel, *J.*

UNITED STATES DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-3165

UNITED STATES GYPSUM CO.

v.

SCHIAVO BROTHERS, INC.

OPINION

[Entered May 24, 1979]

POLLAK, J. 22 May, 1979

In December, 1974, United States Gypsum Co. commenced this landlord-tenant action, alleging that defendant-tenant Schiavo Brothers, Inc., failed to surrender the leasehold property on time and clear of debris. A ten-day non-jury trial was held in late 1975 and early 1976. In May, 1978, Judge Fogel ruled in defendant's favor, filing an exhaustive opinion which concluded that defendant had not breached "either an express covenant to peaceably surrender the premises or an implied covenant to return the land in substantially the same condition as existed at the inception of the lease, (reasonable wear and tear excepted)."[1] Pursuant to Rule 59 of the Federal Rules of Civil Procedure, plaintiff has moved for a new trial.[2]

1. Judge Fogel's opinion is set forth at 450 F. Supp. 1291 (1978).

2. Rule 59 provides in relevant part as follows:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for

I.

Before considering the grounds of the plaintiff's motion, it will be helpful to summarize Judge Fogel's findings of facts and conclusions of law.

In January, 1963, the parties to this litigation entered into a lease agreement for a tract of land located in Southwest Philadelphia and referred to throughout the litigation as Area F. The map below shows its location.[3]

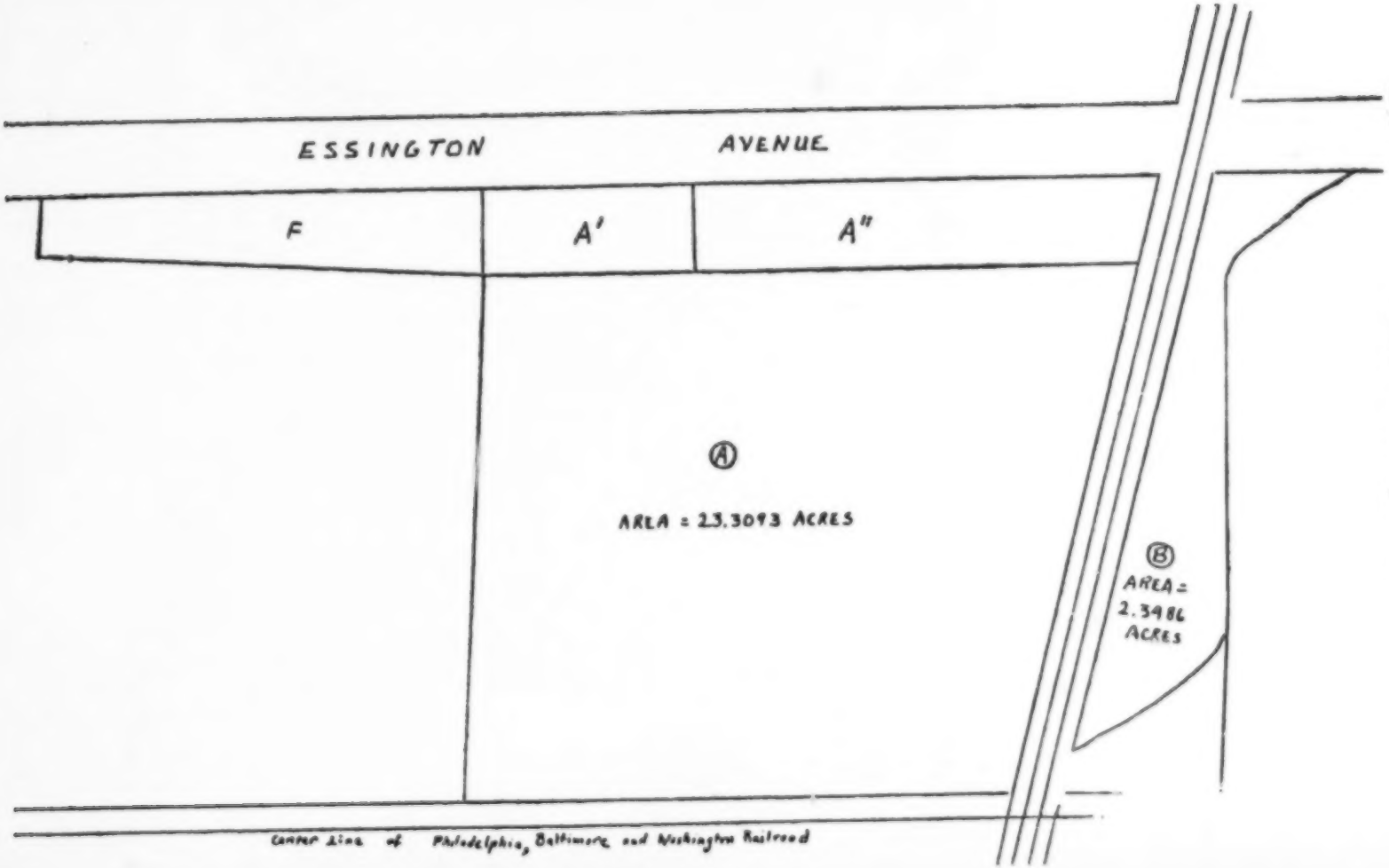
Prior to 1963, Area F was leased by plaintiff to so-called "junk-car dealers" whose business it is to mine wrecked and abandoned automobiles for valuable parts. Under the January, 1963 lease, defendant assumed the role of master tenant responsible for the junk-car-dealer subtenants. In August, 1963, a second lease was signed extending the leasehold property some 200 feet along Essington Avenue to a depth of approximately 100 feet. (This area is marked A' on the map.) Both 1963 leases contained a clause requiring the defendant to return the property as found, reasonable wear and tear excepted.

In 1966, plaintiff and defendant entered into a third lease, superseding and terminating the 1963 leases. The

NOTE — *(Continued)*

which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

3. The map itself is reduced from a map introduced into evidence by stipulation of the parties. The lines marking off Areas F, A', and A" were added by this Court so that the map could be a visual aid to the reader of this opinion; these added lines are not represented as being to scale.


ESSINGTON AVENUE
F
A'
A"
Ⓐ
AREA = 23.3093 ACRES
Ⓑ
AREA = 2.3986 ACRES
Center line of Philadelphia, Baltimore and Washington Railroad

leasehold property was enlarged to encompass all of Areas A and B, parts of which were "below grade." The lease required the defendant to bring the land up to grade and authorized subletting once landfill was complete. Lease Paragraph 20 limited sublessees to persons engaged in the junk-car business.[4] The lease also provided for termination by either party upon 120 days written notice and required surrender of the premises peaceably on termination. But unlike the 1963 leases, the 1966 lease did not contain an express clause imposing on the defendant a duty to return the property as found.

Pursuant to this agreement, defendant undertook landfill operations and sublet to additional junk-car dealers. By 1972, landfill was complete, and dealers had subleased property on Areas F, A', and A" and spread themselves without subleases onto at least some part of the remainder (the "back portion") of Area A. As they spread, the dealers left a trail of old car seats and tires—parts they found difficult to sell. In addition, the back portion of Area A attracted "fugitive dumpers" who favored it with their refuse.

In August, 1973, plaintiff gave defendant written notice of termination, effective January 1, 1974.[5] Defendant, in turn, notified the junk-car dealers who quickly formed an association to fight eviction. Faced with this

4. Paragraph 20 provides:

> Subject to the written approval of Lessor's Works Manager, Philadelphia Plant, which shall not be unreasonably withheld, Lessee reserves the right and privilege to sublet that portion of the subject premises already filled to grade level and of no use to Lessee in conducting a landfill operation provided that subletting shall be only to so called "Automobile Wrecking Yards."

5. It appears from the post-trial briefs that sometime after August, 1973 the parties agreed to a one-month extension, postponing the termination date to February 1, 1974.

opposition, defendant acted expeditiously to remove the subtenants by instituting eviction proceedings in Philadelphia Municipal Court. At a March 4, 1974 hearing, the Municipal Court gave the dealers until June to vacate the premises. One of plaintiff's attorneys was present at the hearing; but since his client was not a party to the eviction suit, he was there in observer status and took no part.

In the meantime, plaintiff had arranged for sale of the leasehold property to Swann Oil Company with closing set for June, conditioned on the removal of all accumulated debris from the property. It was not until September, however, that the last junk-car dealer vacated the premises. And left behind was a considerable accumulation of old cushions and tires and "materials from fugitive dumping, which took virtually every imaginable form, from watermelons to dead cats." 450 F. Supp. at 1301. Plaintiff claims that it spent $144,500 to remove this debris before finally closing with Swann on September 26, 1974.

On the basis of these facts, Judge Fogel ruled as follows: (1) under Pennsylvania law, the 1966 lease contained an implied duty requiring the defendant to return and leasehold premises to the plaintiff at the termination of the lease in substantially the same condition as existed at its inception, reasonable wear and tear excepted; (2) Areas F and A' were in at least as good condition, when returned to plaintiff, as they were in at the inception of the lease in 1966; (3) in Area A" (the portion of Area A leased after 1966 to the junkdealers), the debris, while substantial, was an inevitable consequence of the junk-dealer business—a business expressly contemplated by the 1966 lease—and accordingly, "constituted reasonable wear and tear in the context of the junk-car industry"; (4) as to the junkdealer debris on the remainder of Area A, which defendant did not sublease to the dealers, but onto which they spread, the debris was also reasonable wear and tear

"in the context of this industry"; (5) as to fugitive dumping on the back part of Area A, the defendant was not negligent in failing to take the expensive measures required to prevent this dumping and therefore, under Pennsylvania law, was not liable for breach of its implied covenant; and (6) return of the leasehold in littered condition did not breach the defendant's express covenant to surrender the premises peaceably.

II.

A.

Two of the arguments advanced by plaintiff in support of its motion for new trial have sufficient merit to warrant post-trial relief.

1. Plaintiff contends that the Court failed to rule on two of its damage claims: (1) its claim for rent from February 1, 1974, plaintiff's intended date of termination, to September 26, 1974, when plaintiff conveyed to Swann; and (2) its claim for loss of use of purchase monies under the agreement of sale with Swann. The thrust of both claims is that defendant should be held liable for damages caused by the subtenants who remained on the property after the expiration of the lease, and who thereby prevented plaintiff from (a) completing the sale to Swann on time, or (b) otherwise putting the property to some gainful use after defendant stopped paying rent. (Although characterized as separate items of damage, it would seem analytically more useful to view the two claims as alternative ways of describing the economic loss to plaintiff allegedly occasioned by plaintiff's inability to sell or otherwise utilize its land for a period of several months.)

Defendant does not dispute that these claims were tried and were before the Court,[6] but argues that Judge

6. Neither claim was clearly articulated in the complaint. But it is now "generally accepted that there may be no subsequent chal-

Fogel "specifically found that Defendant was not responsible for the subtenants' illegal refusal to timely vacate." My own reading of Judge Fogel's opinion yields a different conclusion. The opinion focused on the difficult question of liability for left-over debris, and not on the relatively straightforward question of liability for hold-over subtenants. As a result, while Judge Fogel did find that defendant acted expeditiously to remove its subtenants and that plaintiff's attorney did not object to the extension of time granted the dealers by the Philadelphia Municipal Court, he did not discuss whether, as a matter of law, such conduct relieved defendant of liability for damages caused by the hold-overs or estopped plaintiff from seeking such damages. Similarly, while Judge Fogel ruled that defendant did not breach the express covenant to peaceably surrender the premises, this conclusion was reached in the course of rejecting plaintiff's contention that the duty to surrender carried with it a concurrent duty to clean up the debris. Judge Fogel's opinion did not announce that defendant was free of responsibility for subtenants who remained on the premises after February, 1974.

In short, my reading of Judge Fogel's opinion does not permit me to conclude, as the Court of Appeals for the Seventh Circuit concluded in *Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39, 45 (1961), that "the failure to enter findings with respect to [these claims] is tantamount to findings adverse to [the claimant]." Here, I conclude that the failure to enter findings on these two claims was oversight, and one which Judge Fogel would have been required to correct had he still been on the bench when

NOTE — *(Continued)*

lenge of issues actually litigated, if there has been actual notice and adequate opportunity to cure surprise." *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 841 (D.C. Cir. 1950); see also 6 Wright & Miller, § 1491; F.R.Civ.P. 15(b).

plaintiff's motion was filed. As his successor, I am equally obliged to reopen the judgment, take what additional evidence may be necessary, hear argument on the law, and make findings of fact and conclusions of law in order to resolve these two claims. F.R.Civ.P. 63. Accordingly, the judgment is reopened for the purpose of adjudicating these claims.

2. Plaintiff challenges Judge Fogel's conclusion of law that reasonable wear and tear to junkyard property includes a substantial accumulation of junkyard debris. Judge Fogel wrote:

> The uncontradicted evidence produced at trial established that junk car dealers were, in general, an extremely difficult group with whom to deal; that it was an arduous, if not impossible, task to keep them within the bounds of their obligations; that there was a natural expansion of debris beyond their lease boundaries; and that upon termination of a junkyard lease, the dealer rarely, if ever, cleared the property of accumulated debris beyond removing the scrap metal which could be sold. . . . We cannot ignore this evidence. When the lease was executed in 1966, both parties had had experience with junk car dealers; nevertheless, no provision was made in the lease with respect to the responsibility for clearing the debris which the dealers would inevitably produce. We cannot *imply* an obligation to return land wholly free of debris, when the evidence provides no support for a finding that junkyard property would normally be returned in this condition. 450 F. Supp. at 1306 (emphasis in original).

While it is surely correct that a court, in determining reasonable wear and tear, must consider the use to which

property is put, it does not follow that the habitual behavior of junk-car dealers is reasonable *per se*. In tort cases the courts of Pennsylvania—whose law is controlling in this diversity action—have rejected the once fashionable notion that reasonableness is to be judged by the customary conduct of others similarly situated. See *Thomas v. Arvon Products Co.*, 424 Pa. 365, 227 A.2d 897 (1967); *Donnelly v. Fred Whittaker Co.*, 364 Pa. 387, 72 A.2d 61 (1950); *Aquadro v. Crandall-McKenzie & Henderson, Inc.*, 182 Pa. Super. 435, 128 A.2d 147 (1956). And it is now well-settled tort doctrine that a defendant can be liable for failing to do what no one in his position has done before. See Hand, J. writing for the Court of Appeals for the Second Circuit on *The T. J. Hooper*, 60 F.2d 737 (2d Cir.) *cert. denied* 287 U.S. 662 (1932). As Professor Morris has put it, the "obvious inadequacy of a practice may cancel consideration ordinarily shown to a defendant who follows the example of his craft." Morris, Custom and Negligence, 42 *Col.L.Rev.* 1147, 1150 (1942). See also *Prosser, The Law of Torts* (4th ed.), Chapter 5, at 166-68 ("[t]here can certainly be such a thing as customary negligence"). The relevant inquiry in each tort case is whether the defendant's conduct conforms to standards that the community can fairly expect from its members; what people actually do is evidence of reasonableness, but not conclusive evidence.

The Pennsylvania courts have yet to consider whether principles analogous to these would apply, in a landlord-tenant dispute, in determining the reasonableness of a lessee's wear and tear. But it hardly seems likely that the Pennsylvania courts would give custom controlling effect: the fact that Judge Fogel found junkdealers are "in general, an extremely difficult group with whom to deal . . . and that upon termination of a junkyard lease, the dealer[s] rarely, if ever, cleared the property of debris,"

should not, without more, immunize them (or those responsible for them) from liability. Such behavior was not "reasonably necessary in order for the [junk-car dealers] to use the leased property in a manner that [was] reasonable under all the circumstances." Restatement 2d of Property, Landlord-Tenant, Section 12.2. And since a tenant is responsible to its landlord for impermissible physical changes made by its subtenant, see *Winans v. Valentine*, 152 Ore. 462, 54 P. 2d 106 (1936); *Wilson v. Kruse*, 199 Ore. 1, 258 P.2d 112 (1953); Restatement 2d of Property, Landlord-Tenant, Reporter's Note, Section 16-3,[7] Judge Fogel's conclusion that the defendant is without liability for the accumulated junkyard debris does not seem one that would be reached by Pennsylvania courts.

But the question remains whether I am empowered under Rule 59 to overturn Judge Fogel's conclusion because my view of the law is different from his. Defendant cites two leading treatises for the proposition that post-trial relief should be granted only where there is "manifest error of law." 6A *Moore's Federal Practice* ¶ 59.07. See also *Wright and Miller, Federal Practice and Procedure* § 2805 at 41. Indeed there is case authority that on *no* ground may a judge overrule a prior decision of another judge of the same court in the same case. *Sutherland Paper Co. v. Grant Paper Box Co.*, 9 FRD 422, rev'd on other grounds 183 F.2d 926 (3d Cir. 1950); *In*

7. No Pennsylvania case has been brought to my attention dealing with the issue of a tenant's liability for impermissible physical changes made by its subtenant. While the venerable case of *Earle v. Arbogast*, 180 Pa. St. 409, 36 A.923 (1897) (tenant not liable where tank exploded without negligence on his part) speaks broadly of a negligence requirement in any case charging breach of an implied covenant to return as found, I read *Earle* to mean only that Pennsylvania has wisely rejected strict liability for damages to the leasehold caused by accidents or extraordinary forces of nature. See *Restatement of Property, Second*, § 12.2 at 453-5.

re Torrence, 177 F. Supp. 209 (D.Hawaii 1959); but see 7 *Moore's Federal Practice* ¶ 63.06 at 63-12.

Plaintiff in response argues that post-trial relief is required when the trial judge has committed an error of law "determinative of the result," and relies on *Ryans v. Blevins,* 159 F. Supp. 234 (D.Del.) *aff'd per curiam* 258 F.2d 945 (3d Cir. 1958). There, the action was tried to a judge who concluded that plaintiff was entitled to recovery under the doctrine of last clear chance. While a motion for new trial was pending, the trial judge retired; the motion was therefore argued to his successor who ruled that "[t]here was no room here as a matter of law for the application of last clear chance," and entered judgment for the defendant. On appeal, the Court of Appeals for this Circuit affirmed, writing:

> We do not need to decide in this case under what circumstances a judge may reach different fact conclusions from those reached by his predecessor in the same case. If the question raised had to do with the credibility of a witness who had been seen by the first judge but not by his successor that problem would be presented and would have to be settled. But in this instance any difference in fact statements between those made by the first trial judge and his successor are [*sic*] not determinative of the case. The result reached upon reargument was correct regardless of any different interpretation of the facts.

This case, however, is more troublesome than *Ryans.* The legal issue here, unlike the settled doctrine of last clear chance, is a novel one on which prior case law provides little guidance. And my own view of the matter rests heavily on developments in the law of torts, where the parties are unable to bargain in advance about rights

and duties as they obviously can in negotiating a lease. Nonetheless, I am persuaded that Judge Fogel's ruling was error entitling plaintiff to post-trial relief. See *Wright and Miller* § 2801, at 33-35. Accordingly, I will vacate Judge Fogel's judgment for defendant on the issue of liability for accumulated junkyard debris and enter judgment in favor of plaintiff on that issue.[8]

B.

Plaintiff also contests Judge Fogel's conclusion that defendant cannot be held liable for fugitive dumping absent proof of negligence, citing *Thompson on Real Property* for the proposition that a tenant is strictly liable for all acts of third parties harming the leasehold. See *Thompson*, § 1273, at 372. But on this issue Judge Fogel's decision seems to me entirely sound. Professor Powell has traced the strict liability theory, which plaintiff champions, to antiquated procedural rules prohibiting a reversioner from directly suing third-party wrongdoers and has expressed "hope that no further American decisions will be based on a rule which ceased to have justifications in the

8. This decision in plaintiff's favor on the liability question makes it unnecessary to consider plaintiff's contention that Judge Fogel erred in his pre-trial ruling that all evidence of lease negotiations was inadmissible under the parole evidence rule. It should be noted, however, that Pennsylvania's parole evidence rule may have undergone change since the trial in this case. The plurality opinion in *Rempel v. Nationwide Life Insurance Co.*, 370 A.2d 366 (1977) augurs a quiet renunciation of Professor Williston's position on parole evidence, adopted by the Pennsylvania Supreme Court in *Gianni v. R. Russell & Co.*, 281 Pa. 320, 126 A.791 (1924), in favor of Professor Corbin's views. (For a lucid discussion of the difference between the two positions, see *Calamari and Perillo, Contracts*, Sec. 3-3, at 104-5.) The recent majority decision in *Atlantic Richfield v. Razumic*, 390 A.2d 736, 741 n. 6 (1978), provides further evidence of this shift.

last quarter of the seventeenth century." *Powell on Real Property* (abridged edition) § 640 at 689. Likewise, the *Restatements of Property First* and *Second* mandate a showing of negligence before a tenant can be charged with third-party wrongdoing. See *Restatement of Property* § 146; *Restatement of Property Second Landlord-Tenant*, § 12.2 at 460-61. And while there is no Pennsylvania case directly on point, the decision in *Earle v. Arbogast & Bastion, supra* (tenant not liable where tank exploded without negligence on his part) suggests that Pennsylvania would follow the *Powell-Restatement* approach. Accordingly, I subscribe to Judge Fogel's holding that defendant is not liable for damages caused to the leasehold by fugitive dumpers.

Conclusion

For the reasons set forth above, plaintiff's Rule 59 motion is granted in part: (1) judgment will be entered for plaintiff on the issue of defendant's liability for junk-car debris left on the premises after termination of the lease; (2) further proceedings will be scheduled to determine, (a) the damages plaintiff suffered as a result of the junk-car debris left on the premises; and (b) whether defendant is liable for damages caused to plaintiff by hold-over subtenants, and, if so, the extent of such damages.

/s/ Louis H. Pollak
Louis H. Pollak

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 74-3165

UNITED STATES GYPSUM CO.

v.

SCHIAVO BROTHERS, INC.

ORDER

[Entered May 24, 1979]

For the reasons set forth in the accompanying opinion, plaintiff's Rule 59 motion is granted in part: (1) judgment will be entered for plaintiff on the issue of defendant's liability for junk-car debris left on the premises after termination of the lease; (2) further proceedings will be scheduled to determine, (a) the damages plaintiff suffered as a result of the junk-car debris left on the premises; and (b) whether defendant is liable for damages caused to plaintiff by hold-over subtenants, and, if so, the extent of such damages.

LOUIS H. POLLAK
Louis H. Pollak

May 22, 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 74-3165

UNITED STATES GYPSUM CO.

v.

SCHIAVO BROTHERS, INC.

MEMORANDUM

[Entered January 15, 1980]

POLLAK, *J.* January 15, 1980

United States Gypsum Co. commenced this landlord-tenant diversity action in December, 1974, alleging that the defendant-tenant, Schiavo Brothers, Inc., had failed to (1) surrender the leasehold property on time, thereby delaying throughout most of 1974 plaintiff's implementation of a commitment to sell the property to a waiting purchaser, and (2) clear the property, when finally surrendered, of the automobile debris left by sub-tenant auto junk dealers. The case was tried before Judge Fogel in late 1975 and early 1976; and in May, 1978, Judge Fogel ruled in defendant's favor. 450 F. Supp. 1291 (E.D.Pa. 1978). Following Judge Fogel's resignation, the case was reassigned to me and plaintiff moved for a new trial, under F.R.Civ.P. § 59. In its motion for a new trial, plaintiff contended, among other things, that Judge Fogel had failed to rule on two of its damage claims: (1) its claim for rent from February 1, 1974 to September 26, 1974, the

period of asserted wrongful failure to surrender, and (2) its claim for loss of use of the purchase monies which plaintiff would have received sooner had plaintiff been able to convey the property on the date contemplated by the agreement of sale. Plaintiff also contended that Judge Fogel had erred, as a matter of law, in concluding that defendant was not liable for the cost of cleaning up the debris left by the sub-tenants. On May 22, 1979, I filed an opinion and order granting plaintiff's motion in part: (1) I determined that Judge Fogel had inadvertently failed to enter findings as to the claims for rent and/or loss of use of purchase monies even though these claims had been litigated, and I re-opened the judgment in order to adjudicate these claims; and (2) I found for plaintiff on the issue of defendant's liability for junkyard debris. Following that decision, defendant moved for reargument of the motion or, in the alternative, for certification of my order under 28 U.S.C. § 1292(b). On November 8, 1979, I heard reargument pursuant to defendant's motion. For the reasons set forth below, I conclude that my order of May 22 should be amended.

I.

Before I turn to the merits, it may be helpful if I say something further on a preliminary question which I discussed briefly in my May 22 opinion—the authority of a judge to disturb a ruling made by the judge to whom a case was previously asigned.

In my prior decision, I relied on *Ryans v. Blevins*, 159 F. Supp. 234 (D.Del.), *aff'd per curiam* 258 F.2d 945 (3d Cir. 1958), which I felt to be substantial authority for departing in this instance from the well-established rule in this Circuit that "a judge may not overrule a prior decision of another judge of the same court in the same case." *Jurgenson v. National Oil & Supply Co., et al.*, 63 F.2d

727, 729 (3d Cir. 1933). Additional support for departing from the rule is to be found in the observations of the Court of Appeals, sitting *en banc*, in *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713-14 (3d Cir. 1957):

> . . . there may be exceptional circumstances under which the rule is not to be applied. Such circumstances exist when the judge who made the original decision is not available to consider the application to rehear and reverse his decision. If the judge who made the decision . . . resigns from the court he obviously is no longer available to reconsider it and such reconsideration must perforce be by another judge if it is to be had at all. *Id.* 714.

II.

With respect to the merits, the first question to be addressed is whether I erred in overturning Judge Fogel's ruling that defendant was not liable for the cost of removing the junkyard debris. Defendant insists that I erred in looking to the law of negligence rather than to custom in the junkyard business to determine whether its failure to remove junk-car debris by the end of the tenancy breached an obligation to plaintiff imposed by the lease. Defendant argues that the use of a negligence norm imports tort doctrine into a contract suit. But the argument fails to take account of the governing rule announced by the Pennsylvania Supreme Court over eighty years ago: "Generally in the absence of an express covenant on the subject the law implies a covenant on the part of the lessee so to treat the demised premises that they may revert to the lessor unimpaired except by usual wear and tear, and uninjured by any wilful or negligent act of the lessee." *Earle v. Arbogast & Bastian*, 180 Pa. 409, 416-17 (1897); *see Hardware Mutual Ins. Co. of Minn. v. C. A.*

Snyder, Inc., 137 F.Supp. 812, 814 (W.D.Pa. 1956); *see also* 22 P.L.E. § 277.[1]

Accordingly, I decline to amend my order on the issue of liability for accumulated debris.

III.

In my decision of May 22, 1979, I also concluded that Judge Fogel's failure to enter findings on the claims for holdover rent and/or loss of use of purchase monies had been an oversight "which Judge Fogel would have been required to correct had he still been on the bench when plaintiff's motion was filed," Memorandum of May 22, 1979, at pp. 6-7, and I re-opened the judgment to correct that oversight. In its motion for reargument, defendant contends that (1) these claims had not in fact been litigated, and (2) I improperly ventured outside the record in reaching the conclusion that I did. In the alternative, defendant argues that, to the extent that the two claims were litigated, Judge Fogel's silence as to these claims must be deemed a finding of fact against plaintiff. In opposition, plaintiff argues that these claims had been put before Judge Fogel in the Pre-Trial Order (Proposed Find-

1. The rule announced by Mr. Justice Fell for a unanimous court in *Earle v. Arbogast & Bastian* was perceived to be the rule prevailing in most state and federal courts, and particular reliance was placed on Chief Justice Waite's then recent opinion for a likewise unanimous court in *United States v. Bostwick*, 94 U.S. 53 (1877). Defendant cites two cases in opposition to the application of negligence rules in this case: *Philadelphia v. The Hertz Corp.*, 6 D&C 3d 17, 28-29 (C.C.P. 1977) did look to industry custom to shed light on the term "gross revenues" as used in a lease; but nothing in the opinion casts doubt on the continuing vitality of the *Arbogast & Bastian* implied covenant, of which negligence is a key ingredient. *Vitex Manufacturing Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967) does not involve a lease, nor is it a Pennsylvania case, so it seems quite without application here.

ings of Fact), at pp. 24 (¶ 32), 25 (¶¶ 35, 37) and 28 (¶ 5), and in the post-trial proposed findings. Plaintiff's Brief in Support of Proposed Findings of Fact and Conclusions of Law, Appendix A, at pp. 15-17 (¶¶ 47-59) and 21 (¶ 6). However, plaintiff has not shown, by way of attempted substantiation of the somewhat delphic proposed findings, that at any point in the ten-day trial there was any significant exploration of the issue of holdover tenants, as opposed to holdover debris.[2] Accordingly, I have concluded that the presentation of these two damage claims at the trial before Judge Fogel did not place them in so clear a focus as to warrant my concluding that (1) the claims were actually litigated, and (2) Judge Fogel erred in not ruling on them. It was, therefore, inappropriate for me to re-open the record as to these claims. I will vacate that portion of my May 22 order.

IV.

These decisions leave only the amount of damages for junkyard debris clean-up still to be determined in this case. At the reargument, the parties gave differing estimates of the time that the remaining proceedings would take if my May 22 order were allowed to stand. Today's modification of the May 22 order should mean that the hearing on damages will be materially shorter than the

2. Furthermore, as defendant points out, plaintiff's agent, Mr. Hansen, conceded on cross-examination that he had instructed another agent of the plaintiff, Mr. Starner, "not to accept any rental credits after January 1974" in favor of the defendant. (N.T. 3.70-3.71). This evidence was not contradicted, although the refusal of further rental credits was explained as designed "to make our position clear that the lease was terminated." (N.T. 3.70). This explanation, although not inconsistent with plaintiff's position that it was entitled to holdover rent or the equivalent, certainly does not suffice to show that it had not given defendant the impression it consented to the presence of the holdovers.

several days estimated by defendant. At any rate, I am not persuaded that appellate review at this juncture would "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), or that the issues possess the "uniqueness, exceptionality, or extraordinary importance" that would warrant appellate review now. *In re Japanese Electronic Products Antitrust Litigation*, MDL 189 (E.D. Pa., August 4, 1979), slip opinion at 11. Accordingly, I will not certify this order under § 1292(b).

/s/ Louis H. Pollak
Louis H. Pollak

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-3165

UNITED STATES GYPSUM CO.

v.

SCHIAVO BROTHERS, INC.

ORDER

[Entered January 15, 1980]

For the reasons set forth in the accompanying memorandum, my Order of May 22, 1979 is vacated insofar as it re-opened the judgment in this case for a determination of damages caused to plaintiff by hold-over tenants. In all other respects, the defendant's prayer for relief from that Order is DENIED.

/s/ LOUIS H. POLLAK
Louis H. Pollak

January 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1168 and 81-1272 and 81-1273

UNITED STATES GYPSUM COMPANY,
Appellant in Nos. 81-1168 & 81-1272

v.

SCHIAVO BROTHERS, INC.,
Appellant in No. 81-1273

(D.C. Civil Nos. 80-0391 and 74-3165)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT

[Entered November 30, 1981]

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 22, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court entered November 14, 1980 in Civil No. 80-0391 and appealed at our No. 81-1168, be, and the same is hereby vacated and the cause remanded for further proceedings consistent with the opinion of this Court. It is further ordered and adjudged by this Court that the judgment of the said District Court entered November 14, 1980, as amended by order entered January 2, 1981, in Civil No. 74-3165 and appealed at our Nos. 81-1272 and 81-1273, be, and the same is hereby affirmed in part and reversed in part and the cause remanded for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos
Clerk

November 30, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1168 & 81-1272/73

UNITED STATES GYPSUM COMPANY,
Appellant/Cross Appellee,

v.

SCHIAVO BROTHERS, INC.,
Appellee/Cross Appellant.

SUR PETITION FOR REHEARING

[Entered December 23, 1981]

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by SCHIAVO BROTHERS, INC., Appellee and Cross Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM, JR.
Circuit Judge

Dated: December 23, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1168 and 81-1272/3

UNITED STATES GYPSUM COMPANY,
Appellant in Nos. 81-1168 and 81-1272

v.

SCHIAVO BROTHERS, INC.,
Appellant in No. 81-1273

(D. C. Civil Nos. 74-3165 and 80-0391)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

AMENDED JUDGMENT

[Entered January 6, 1982]

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 22, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 14, 1980 in Civil No. 80-0391 and appealed at our No. 81-1168, be, and the same

is hereby vacated and the cause remanded for further proceedings consistent with the opinion of this Court. It is further ordered and adjudged by this Court that the judgment of the said District Court entered November 14, 1980, as amended by order entered January 2, 1981, in Civil No. 74-3165 and appealed at our Nos. 81-1272 and 81-1273, be, and the same is hereby affirmed in part and reversed in part and the cause remanded for further proceedings consistent with the opinion of this Court.

Costs taxed in favor of United States Gypsum Company and against Schiavo Brothers, Inc.

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos
Clerk

January 6, 1982

Opposition

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

81-1669

No. 81-[redacted]

IN THE

Supreme Court of the United States

October Term, 1981

SCHIAVO BROTHERS, INC.,

Petitioner

v.

UNITED STATES GYPSUM CO.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court exercise its certiorari jurisdiction to review a judgment of the Court of Appeals for the Third Circuit, interpreting Pennsylvania landlord-tenant law in a suit for damages where federal jurisdiction rests solely on diversity between the parties and the factual situation is novel?

COUNTER-STATEMENT OF THE CASE

In 1966, Petitioner, Schiavo Brothers, Inc. ("Schiavo"), and Respondent, United States Gypsum Company ("Gypsum") entered into a written Lease Agreement for a large tract of open land in Philadelphia. Schiavo, a waste hauling company, was going to use the land, much of which was below grade, as a dump. The lease allowed Schiavo to sublease those portions of the land filled to grade level, to junk car dealers.

After Schiavo brought portions of the land up to grade level, Schiavo subleased the land to junk car dealers, who began to occupy significant portions of the land.

In late 1973, Schiavo gave notice to Gypsum that Schiavo intended to terminate the lease effective December 31, 1973. As of the date of termination, Schiavo was unable to turn the land over to Gypsum because Schiavo's subleasees, the junk car dealers, refused to leave and eventually Schiavo began eviction proceedings and the junk car dealers actually left in June-July 1974. However, after the junk car dealers left their debris on the land, Gypsum was required to spend $144,500.00 to clean off the land, in order to sell the property to a third party. Gypsum started this suit to recover these damages, and also damages for Schiavo's holdover tenancy.

The District Court, Judge Herbert A. Fogel, after a nonjury trial, found that most of the land was clean at the start of the lease in 1966. However, after finding the facts as stated above, the Court also found that the junk car dealers dumped junk over other portions of the land which they did not sublease. Nonetheless, Judge Fogel found against Gypsum and discussed its Complaint.

Judge Fogel decided two issues with which we are here concerned: First, the lease between Gypsum and Schiavo contained an implied covenant requiring Schiavo

to return the leasehold premises to Gypsum at the termination of the lease in substantially the same condition as existed at its inception, reasonable wear and tear excepted (App. A53); Second, Schiavo's accumulation of junk car debris on the leasehold premises was not, in the context of the junk car industry, unreasonable wear and tear to the land. (App. A58, A59, A63.)

Judge Fogel filed his adjudication on the last day of his tenure as a Federal Judge, May 1, 1978. Gypsum filed a Motion for New Trial which was assigned to and heard by the Honorable Louis A. Pollak. After argument, Judge Pollak reversed Judge Fogel, in part, holding, on the facts as found by Judge Fogel, that Pennsylvania law would impose a duty on Schiavo to clean off at least some of the debris put there by Schiavo's subtenants. The District Court entered Judgment for Gypsum, that the cost of the removal of the debris properly allocable to Schiavo was $96,815.

Judge Pollak's interpretation of Pennsylvania law was upheld and the money judgment was affirmed by the Third Circuit Court of Appeals. However, in addition to affirming Judge Pollak on this point, the Court of Appeals reversed Judge Pollak's ruling that Schiavo was not liable to Gypsum for damages due to Schiavo's holdover tenancy, and remanded this issue for a further hearing, which has not yet been held.

Schiavo then secured a stay of the Third Circuit's mandate and filed its Petition in this Court.

REASONS FOR DENYING THE WRIT

1. This Case Fails to Meet the Standards of Rule 17 of This Court

The first reason for denying the Petition for Writ of Certiorari in this case is the failure of Petitioner Schiavo to meet the standards included within Rule 17, of the Rules of this Court, entitled "Considerations Governing Review on Certiorari."

Petitioner has failed to set forth any circumstances under which the decision of the Third Circuit Court of Appeals in this case conflicts with the decision of any other Federal Court of Appeals. This case does not involve any federal questions or any issue of constitutional law.

The purported issue, interpretation of Rule 52(a), of the Federal Rules of Civil Procedure, does not come under Rule 17.1(c) because there is no showing that the treatment of this case in the lower courts has raised an issue "which has not been but should be, settled by this Court." Petitioner does not even cite Rule 17.1(c).

The Court of Appeals did not violate Rule 52(a), as the sole issue before the Court of Appeals involved a question of determining how the law of Pennsylvania would treat the facts; and the judgment of the Court of Appeals rests on an adequate state law ground, and the Federal Rules of Civil Procedure were not violated.

2. There Has Been No Violation of the "Clearly Erroneous" Rule

In this case, Judge Fogel heard the testimony and found the facts. See 450 F. Supp. 1291 (E. D. Pa., 1978), A23-A72. The material facts established by Judge Fogel were that the land was free and clear of debris in 1966

(except for some small portions which had previously been leased to junk car dealers) and that, as of January 1, 1974, when Schiavo terminated, numerous junk cars, tires and other types of junk car debris remained on the property. Judge Fogel further found that Schiavo had to resort to legal action to evict its subtenants, and then Schiavo disclaimed any responsibility for the debris which the subtenants left on the property.

Judge Fogel, after finding those facts, then applied a legal standard to reach a conclusion of law, that, under Pennsylvania law, considering the terms of the lease, and particularly the fact that the lease allowed Schiavo to sublease to junk car dealers, it was not unreasonable for Schiavo to leave the property without removing the junk car debris. See 450 F. Supp. at 1306, A54-A64. Indeed, Judge Fogel's decision on this point is under the heading "Breach of the Implied Covenant" (450 F. Supp. at 1304, A53) which clearly denotes a legal discussion rather than a factual finding.

After Gypsum filed its post-trial Motion, Judge Pollak had a different conclusion as to the law of Pennsylvania. See 485 F. Supp. 46, at 53, A81-A83. There is no contention in this Court that Judge Pollak did not have the power to reach a different legal conclusion than his predecessor, Judge Fogel.

Schiavo is wrong when it characterizes this legal conclusion by Judge Fogel as a "factual finding" subject to the "clearly erroneous" language of Rule 52(a).

Judge Pollak did not in any way, shape or form change any of the factual findings made by Judge Fogel. Similarly, the Third Circuit, in affirming Judge Pollak's legal conclusion that Schiavo was responsible to Gypsum for a substantial part of Gypsum's cost of clearing the debris, did not change any of Judge Fogel's factual findings.

The Court of Appeals concluded that the determination made by Judge Pollak was essentially a legal one since only the legal consequences of Schiavo's conduct and not the particulars of the conduct itself were an issue before Judge Pollak:

> "He was asked to decide whether the law of landlord and tenant in Pennsylvania would hold Schiavo liable for damages because of the undisputed condition of the property after the termination of the lease. That determination is essentially a legal one. We conclude that where a successor judge is asked by timely and proper motion to reconsider the legal conclusions of an unavailable predecessor, he or she is empowered to reconsider those issues to the same extent that his or her predecessor could have." (App. A8)

Thus, the Court of Appeals did *not* reverse the trial court's finding of reasonableness as Schiavo so misleadingly contends. (App. A3). Rather, the Court of Appeals merely held that a successor District Court Judge was empowered to reconsider legal conclusions of an unavailable predecessor District Court Judge to the same extent that such predecessor could have done. The Court of Appeals then agreed with the legal determination of Judge Pollak who ruled that the wear and tear inflicted on the leasehold property by Schiavo was unreasonable and that Schiavo should compensate Gypsum for it. (App. A13).

Gypsum asserts that this case is a simple example of one judge concluding, on the routine disposition of post-trial motions, that another judge had used an improper legal standard—and the Court of Appeals, in reviewing the District Court's application of a particular legal standard, agreed with the second Judge.

In considering which of several legal standards is the correct one for a particular case, a court is not bound by the clearly erroneous rule, but rather can and must review this issue as a question of law, in a plenary review.

The Third Circuit's holding on this point is correct:

> The parties disagree on whether the "reasonableness" determination is a finding of fact or a conclusion of law. Generally, where the primary facts are undisputed and only ultimate inferences and legal consequences are in contention, a question of law is presented; or, by some formulations, a mixed question of fact and law subject to review as a question of law. (Citations omitted.)
> — F. 2d —, slip op. at p. 7, A7.

The Third Circuit has clearly acknowledged that generally, questions of reasonableness are questions of fact under Pennsylvania law. See *Barco Urban Renewal Corporation v. Housing Authority of the City of Atlantic City, et al.*, — F. 2d —, Nos. 81-2082, 81-2467, 81-2468, March 12, 1982, Slip Opinion, at pages 14-16.

The issue in this case was not what the "reasonable man" would do—the type of finding which has always been recognized as plainly factual in nature—and therefore subject to the "clearly erroneous" rule. The "reasonableness" issue in this case was "reasonable wear and tear." Stated differently, the issue in this case was what legal standard would Pennsylvania law impose on a tenant vis-à-vis his subtenants and landlord—in light of (1) the implied covenant, in Pennsylvania law, that a tenant must return realty in the same condition as received, less reasonable wear and tear, and (2) the equally important principle, that a tenant is responsible for the actions of its subtenants.

This Court has clearly held that the question of whether a District Court applied a proper legal standard

to undisputed facts is a question of law and is not subject to the Rule 52(a) "clearly erroneous" limitation on a reviewing court. *United States v. Parke, Davis & Company,* 362 U. S. 29, 44-45 (1960), *Kelley v. Southern Pacific Company,* 419 U. S. 318 (1974).

The principle that a District Court's choice of an improper legal standard is subject to review as a question of law has also been applied by several circuit courts. See *Baker v. Stuart Broadcasting Co.,* 560 F. 2d 389 (8th Cir. 1977), *Peterson Industries Inc. v. Lake View Trust and Savings Bank,* 584 F. 2d 166 (7th Cir. 1978), *Costello v. Lipsitz,* 547 F. 2d 1267 (5th Cir. 1977), *cert. denied,* 434 U. S. 829 (1977), *Karavos Compania, etc. v. Atlantica Export Corporation,* 588 F. 2d 1 (2nd Cir. 1978).

The Third Circuit recently set forth the varying standards of review in *Universal Minerals Inc. v. C. A. Hughes & Co.,* — F. 2d — (#81-1797, December 30, 1981); and noted, "To the extent the parties challenge the choice, interpretation, or application of legal precepts, we always employ the fullest scope of review. . . ." Slip Op., at 6. The above is exactly what happened in the present case, and is entirely in accord with settled law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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